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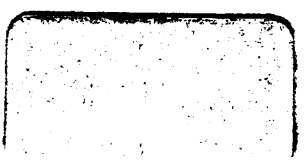

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C. B. Whittier

A

TREATISE

ON THE

PRACTICE

OF THE

HIGH COURT OF CHANCERY,

WITH SOME

PRACTICAL OBSERVATIONS

ON THE

PLEADINGS IN THAT COURT.

By EDMUND ROBERT DANIELL, F. R. S.
BARRISTER AT LAW.

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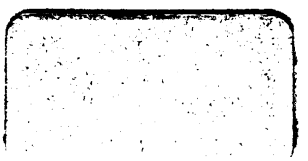

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CHAPTER XXVII.

OF COSTS.

SECT. I.—*Of Costs in General.*

As it is the usual practice of the Court, where, upon the hearing, it directs either an issue or a case or a reference to a Master, not to give any directions upon the subject of costs till after the verdict or certificate of the Judges has come in, or till the Master has made his report, (a practice which appears to have been adopted for the purpose of accelerating the final termination of the suit,) (*a*) it generally happens that the costs of the suit are taken into consideration at the time when the cause comes on for hearing for further directions, and that on such occasions, as soon as the further directions are disposed of, the Court makes such order with regard to the costs as it thinks the justice of the case requires. In this respect the Court of Chancery, to a certain extent, acts upon the rule adopted by Courts of Law, that *unica directio fiat damnorum*, and which, therefore, give no costs, except upon interlocutory applications, until the final judgment. Courts of Equity, however, do not, in all cases, consider themselves bound by this rule, and they frequently give costs in intermediate stages of the cause, without waiting for the final decree. In fact the giving of costs in equity is entirely discretionary, (*b*) as well with respect to the period at which the Court decides upon them, as with respect to the parties to whom they are given; but as it is usually upon the hearing for further directions that the question of costs is decided, the present appears *to be the proper stage of this Treatise for directing the practitioner's attention [*2] to the principles upon which the Courts act in their decisions upon them.

When it is said that the giving of costs in Courts of Equity is entirely discretionary, it must not be supposed that these Courts are not governed by definite principles in their decisions relative to the costs of proceedings before them, all that is meant by the *dictum* is, that these Courts are not, like the ordinary Courts, held inflexibly to the rule of giving the costs of the suit to the successful party, but that they will, in awarding costs, take into their consideration, the circumstances of the particular case before it, or the situation or conduct of the parties, and exercise their discretion with reference to those points. In exercising this discretion, however, Courts of Equity are generally governed by certain fixed principles which they have adopted [redacted] the subject of costs, and do not, as is frequently supposed, act upon the m[redacted]price of the Judge before whom the cause happens to be tried.

Another difference between the Courts of Law and Courts of Equity with respect to costs, frequently arises from the nature of the property over which Courts of Equity are called upon to exercise their jurisdiction. A large pro-

(*a*) *Vide* Scarborough v. Burton, 2 Atk. 111.
(*b*) Ibid.; Bennet College v. Carey, 3 Bro. C. C. 390.

portion of suits in equity are instituted for the purpose of obtaining the administration of the property of deceased persons, and in cases of that description, the habit of the Court is, not to direct the costs of the proceedings to be paid by one party to another, but to order the payment of them to be made out of the estate. The Court will also, for the purpose of affording due protection to trustees or others concerned in the administration of trust property, order the costs they have been put to, to be paid out of the fund which is the subject of litigation. In considering the subject of costs, therefore, I shall direct the attention of the reader, 1st, to the rules upon which the Court acts in awarding the costs of a suit to be paid by one party to another: 2ndly, to the rules which regulate their determination with regard to the payment of costs out of the fund.

[*3] The Court of Chancery also makes a distinction, which does *not exist at Law, with regard to the principle upon which the officer of the Court is to proceed in the taxation of costs, by allowing a larger proportion of actual expenditure to parties holding particular characters, than they allow in ordinary circumstances. This distinction is marked by the terms of costs "*as between party and party*," which are the ordinary costs allowed by the Court, and costs "*as between solicitor and client*," which are the costs allowed by the Court to parties filling the characters alluded to; (*b*) a third section, therefore, will be devoted to the consideration of the principles of taxation for the purpose of pointing out those cases in which the Court allows of the taxation of costs upon a more extended scale than the usual scale of taxation between party and party, after which I shall consider, 4thly, the method of taxation and the course to be adopted to bring the determination of questions relating to the taxation before the Court; and, 5thly, the course to be adopted for enforcing the payment of the costs when taxed.

In treating of the subject of costs in this place, the attention of the reader will be directed to the costs only of the general proceedings in the suit, that is, to those costs which are technically termed "*costs in the cause*," the rules with regard to the costs of interlocutory proceedings and other incidental matters will generally be found upon referring to those parts of the Treatise which have been appropriated to the consideration of those matters.

It may be observed, however, that, with respect to the costs of interlocutory proceedings, certain rules exist with regard to their being or not being "costs in the cause," and that those costs which do not come within the definition of costs in the cause, under these rules, cannot be obtained as such without the

[*4] special direction of the Court. What costs of interlocutory *applications by motion, are to be considered as "costs in the cause," may be collected from the following rules laid down by Sir John Leach, V. C., in 1823. (*c*) These rules, which were the result of certain questions proposed to the Registrar, (Mr. Walker,) for the purpose of ascertaining in what cases the costs of a motion, where the Court gives no direction as to such costs, became "costs in the cause" to a party whose costs of suit are given upon the hearing, and are as follo[illegible]

1st. That the party m[illegible] a successful motion is entitled to his costs as "costs in the cause," but the party opposing it is not entitled to his costs as "costs in the cause." (*d*)

(*b*) Formerly, in cases of notorious frauds, the Court made the defendant pay *exemplary costs*, but this practice has been disused from the difficulty of carrying it into execution. Waltham v. Broughton, 2 Atk. 43.

(*c*) Memorandum, 1 S. & S. 357.

(*d*) Memorandum, 1 S. & S. 357.

2nd. That the party making a motion which fails is not entitled to his costs as "costs in the cause," but the party opposing it is entitled to his costs as "costs in the cause." (*e*)

3rd. That where a motion is made by one party, and not opposed by the other, the costs of both parties are "costs in the cause." (*f*)

To these rules the Vice Chancellor added, that it was, therefore, the duty of the Court, whenever, by reason of special circumstances, it was not the intention of the Court that these rules should apply, to give particular directions with respect to the costs; but that the Court very rarely gave any special directions with respect to the costs of a motion for the purpose of obtaining, continuing, or dissolving an injunction to stay proceedings at law, leaving the costs of such motions to abide the event of the suit. An instance of the Court's departure from the ordinary rule occurred before the same learned Judge in *Marsack* v. *Reeves*. (*g*) In that case the object of the suit was to have a bond delivered up on payment of the principal money and interest, and an injunction to restrain proceedings at law, and an *ex parte* injunction was obtained upon the plaintiff's paying the principal money and interest into Court. The defendant afterwards moved to dissolve the injunction, but failed, and although, according to the ordinary *rule of the Court, as above laid down, the costs of the plain- [*5] tiff in resisting the motion to dissolve the injunction, would have been "costs in the cause," yet, as the habit of the Court is to consider suits of the nature of the one in question, as suits to redeem, in which the costs are to be paid by the plaintiff, (the consequence of which, if no order were made as to costs, would be that the plaintiff would be deprived of his costs of the motion,) his Honor directed the motion to be dismissed *with costs*.

The costs of an abandoned motion are not costs in the cause, and therefore, where a party gave notice of a motion and died before the motion was heard, and the suit was revived by his executors who declined to proceed with the motion,—upon the bill being afterwards dismissed with costs, the Master, in taxing the costs, disallowed the defendants the costs of the abandoned motion; whereupon they made an application to the Court, for liberty to except to the Master's certificate, and Sir C. C. Pepys, M. R., being of opinion that the case was unprovided for by Lord Eldon's Order of the 5th of August, 1818, (*h*) directed a reference to the Six Clerks to ascertain whether, previously to that order, the costs of an abandoned motion were considered as costs in the cause, and, upon those officers certifying their opinion that they were not, the application was dismissed with costs. (*i*)

It may be noticed in this place, that the new orders of 1828 and 1833 have directed the costs of several proceedings to be costs in the cause which before were not considered as such. Of this nature are the costs occasioned to a defendant by the amendment of the plaintiff's bill, which have been before alluded to, (*k*) and the costs occasioned to a plaintiff by the insufficiency of a defendant's answer. (*l*)

It may be mentioned here, that, upon the qu[illegible]of costs, a defendant in equity has the advantage of appealing to his ow[illegible]swer, and that, although such answer cannot be read as *evidence on his own behalf, upon [*6] the matter in dispute between him and the plaintiff, the Court will,

(*e*) Ib.; *vide etiam* White v. Lisle, 4 Mad. 226. The rule applies to motions to obtain or to dissolve an injunction. Marsack v. Reeves, Mad. & Geld. 108.
(*f*) 1 S. & S. 357.
(*g*) *Ubi supra*.
(*h*) 1 Swanst. 128.
(*i*) Lewis v. Armstrong, 3 M. & K. 69.
(*k*) *Vide ante*, vol. 1, p. 552.
(*l*) *Ante*, vol. 2, p. 327.

before it decides upon the question of costs, look into the answer, and act upon the representations it contains, (*m*) and it will frequently, although compelled, by the evidence read in the cause, to decree against a defendant, give credit to his own statement, contained in his answer upon oath, as to his conduct, and make the decree against him without costs. (*n*) The same practice also extends to the answers of Peers, (*o*) although they are put in upon honour only and not upon oath. (*p*)

The rule above laid down will not, however, apply to cases in which a tender of the amount due is relied upon by the defendant. The mere statement of a tender in the answer is not sufficient to save costs, it must be proved. (*q*)

SECTION II.

Of Costs from one Party to another.

It was the rule of the civil law, that *victus victori in expensis condemnatus est*, (*a*) and this is the general rule adopted in the Court of Chancery, as well as in Courts of Law, at least to the extent of throwing it upon the failing party to shew the existence of circumstances to displace the *primâ facie* claim to costs given by success to the party who prevails. (*b*)

If, however, the failing party can shew to the Court any circumstances which may satisfy it that it would be against the ordinary principles of justice that he should pay the costs of the proceeding, he will be permitted to do so; and the [*7] Court *will even, under certain circumstances, not only excuse the unsuccessful party from the payment of costs to his opponent, but will actually throw his costs upon the party succeeding. Cases of the latter kind, however, are very limited.

It is to be observed, that the general rule which gives the costs of the suit to the victorious party, and throws them upon the unsuccessful party, applies equally to cases in which the parties are suing or defending in *autre droit*, and to those in which they are *sui juris*. Therefore executors, administrators, or trustees, instituting or defending suits against strangers to their trusts in those capacities, are subject to the same rules, as to costs, as they would be if they were suing or defending in their own rights. Thus an executor or administrator instituting a suit against a debtor to his testator's or intestate's estate, as he will, if he succeeds be entitled, under the general rule, to the costs of his suit from the debtor, so, if he fails, must he pay the costs of his adversary. (*c*) In like manner a trustee for sale, filing a bill against a purchaser for a specific performance of his agreement, is liable to pay or receive costs from his adversary, in the same manner as a person instituting or defending such a suit in his own right. (*d*) The question whether a party who sues or defends in *autre*

(*m*) Vancouver v. Bliss, 11 Ves. 458; Howell v. George, 1 Mad. 1.
(*n*) *Vide* Millington v. Fox, 3 M. & C. 338.
(*o*) Dawson v. Ellis, 1 J. & W. 524. (*p*) *Ante*, vol. 2.
(*q*) Milnes v. Davison, 3 Mad. 374; *sed vide* Beames on Costs, 69.
(*a*) Cod. 3, 1, 13.
(*b*) Vancouver v. Bliss, 11 Ves. 463; Staines v. Morris, 1 V. & B. 8, 15; Millington v. Fox, 3 M. & C. 338, 356.
(*c*) *Vide* Westley v. Williamson, 2 Moll. 458.
(*d*) Edwards v. Harvey, Coop. 39.

droit, and is unsuccessful, shall be reimbursed his costs out of the estate which he represents, or in respect of which he is a trustee, is a totally distinct one, and will partly be discussed hereafter, when we come to treat of cases in which costs are payable out of the fund which is the subject of litigation. (*e*) In the meantime it may be remarked that there are two cases in which the Court acts apparently in opposition to this principle, and throws the costs of the suit upon the successful plaintiff: these are where an infant defendant is brought upon an attachment, and no one appearing willing to act as guardian for him, the Court appoints the senior Six Clerk, not towards the cause, to be his guardian *ad litem*; (*f*) in such case, the Court will, if possible, save the officer whom it has appointed, harmless *from the costs, by directing them to be paid by the plaintiff, although he may be successful. So where a [*8] bill was filed for a foreclosure, to which an infant claiming under a settlement made by the mortgagee, was a party and a Six Clerk had been appointed by the Court to be his guardian *ad litem*, the decree was pronounced for a foreclosure, and Sir J. Leach, V. C., gave the Six Clerk his costs, which he ordered the plaintiff to pay, who was to have them over again from the defendant, the mortgagor, with his other costs in case of redemption. (*e*)

The other case is, that of a provisional assignee of a mortgagor who has taken advantage of the Act for the Relief of Insolvent Debtors, and who, it seems, will in like manner be decreed his costs, to be paid by the plaintiff, and added to his own costs in case of redemption. (*f*)

It is to be observed, that the above cases proceed upon the ground, that the guardian in the one, and the provisional assignee in the other, are public officers, and have the duty cast upon them. It is therefore quite right that they should be indemnified by some one, and as there is no fund to which they can apply for payment of their costs, it is but just that the party by whom they are brought before the Court, and who, without their presence, could not obtain his demand should be made to pay them; but the exception which allows the provisional assignee of an insolvent debtor his costs from the mortgagee, does not apply to assignees in general, who are not entitled to the costs of a suit for a foreclosure, although they have, by their answer, disclaimed, and say that, if they had been applied to, they would have released the equity of redemption. (*g*)

There are, also, certain cases, arising from the character sustained by the party, in which the Court generally gives the costs to that party, whatever may be the result of the suit. One of these cases is where an heir-at-law is made a party to *a suit for the purpose of establishing a claim against [*9] real estate. In these cases it is the almost invariable rule of the Court, to give the heir-at-law his costs of the proceeding. In this respect the heir is more favoured than executors. "Executors," says Lord Hardwicke, "shall not have costs, because they may renounce, but it is the law, which cast the descent upon the heir, and that differs his case from the executor's: and if he has accounted, justly, for such money as is come to his hand, it certainly entitles him to his costs." (*h*)

So, where an heir-at-law is made party to a suit for the purpose of proving a will against him, he will be entitled to his costs (*i*) and he will not forfeit

(*e*) *Vide post*, s. 3. (*f*) *Ante*, vol. 1, p. 230.

(*e*) Eley v. Bicknell, Beames on Costs, ed. 1840, p. 90; Olin v. Avery, and Higgins v. Brown, ibid. p. 91, n.

(*f*) Peake v. Gibbon, 2 R. and M. 254; Weaving v. Count, 6 Sim. 439; Woodward v. Haddon, 4 Sim. 606.

(*g*) Collins v. Shirley, 1 R. & M. 638; Mountford v. Scott, 3 Mad. 34; Woodward v. Haddon, 4 Sim. 606; *sed vide* Thompson v. Rendall, 9 Sim. 397.

(*h*) Humphry v. Morse, 2 Atk. 408.

(*i*) Crew v. Jolliff, Prec. in Ch. 93; Luxton v. Stephen, 3 P. Wms. 373.

this right by cross-examining the plaintiff's witnesses. (*k*) So, also, where an heir-at-law is brought before the Court in the case of a charity, he will be entitled to his costs; and, in general, if he makes no improper point, he will be awarded them as between solicitor and client. (*l*) And in a charity case where an heir-at-law was made a defendant, pursuant to an order of the Court, he was allowed his costs as between solicitor and client, although the Court was, upon the hearing, of opinion that there was no resulting trust in his favour. (*m*)

This rule, that an heir-at-law is entitled to his costs, is not, however, without exceptions. Thus where an heir set up a claim to property as undisposed of under the will and failed, he was refused his costs; (*n*) and, where the bill is merely one to perpetuate the testimony of the witnesses to the will, if the heir examines witnesses of his own in chief he will not be allowed his costs of so doing; (*o*) but this is only where the bill does not pray relief, or is not one of a nature to be brought to a hearing. Where the cause is one which may be brought to a hearing, more latitude is allowed; (*p*) if he chooses to examine
[*10] witnesses himself, *the question of costs will depend upon the circumstances; but he is indulged in going a step further. On account of the frail and imperfect mode of examining into *facts* in this Court, he has a right, *ex debito justitiæ*, (*p*) to demand an issue, to the costs of which, even though the verdict be against him, and the will is established, (*q*) he will, unless there are any peculiar circumstances in the case which may induce the Court to refuse them, be considered entitled. (*r*) Thus where one of the witnesses did not clearly prove the execution of the will, and the heir asked for an issue, on the trial of which the will was found duly executed, upon the case coming on for further directions the heir asked for his costs, both in law and in equity, and they were given him by the Court. (*s*)

Amongst the peculiar circumstances which will induce the Court to refuse costs to an heir, may be mentioned his attempting to set up insanity or any other disability against the person who made the will. (*t*) And, in a recent case, a defendant, brought before the Court as heir, was deprived of his costs, both at law and in equity, because he had thought proper to state in his answer to the original bill, that he was heir-at-law to the testator, and to dispute the will, although he knew, as he admitted in his answer to the supplemental bill, that his elder brother had left children. (*u*)

It may be mentioned here, that where an heir-at-law had been brought before the Court as a defendant, and had contested the will, to try the validity of which an issue was directed, which was twice tried, and on both trials verdicts given for the plaintiff, and afterwards the heir-at-law came in and proved against the estate as a creditor under the decree, which directed the estate to be sold for the payment of debts, upon the question whether the heir was entitled to his costs, it was held that he was entitled. (*x*) Where, however, an heir-at-law
[*11] *unnecessarily filed a cross bill for the purpose of establishing his claim to certain legacies to charities which the testator had charged

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(*k*) Boyer v. Boyer, 1 Dick. 300. (*l*) Currie v. Pye, 17 Ves. 462.
(*m*) Atty. General v. The [illegible]rdashers' Company, 4 Bro. C. C. 178.
(*n*) Rashley v. Masters, 1 [illegible] 205.
(*o*) Berney v. Eyre, 3 Atk. [illegible]; Vaughan v. Fitzgerald, 1 Sch. & Lef. 316.
(*p*) Berney v. Eyre, *ubi supra*. (*p*) White v. Wilson, 13 Ves. 87.
(*q*) Ibid; Berney v. Eyre, 3 Atk. 387; Webb v. Claverden, 2 Atk. 424; *sed vide* Tuthill v. Scott, 2 Moll. 468; Tucker v. Sanger, 1 M'Lel. & Y. 425; 13 Pri. 609. S. C.
(*r*) For the practice with regard to the costs of issues to try the validity of wills, *vide ante*, vol. 2, p. 760.
(*s*) Wright v. Wright, 5 Sim. 449.
(*t*) Berney v. Eyre, 3 Atk. 387; *ante*, vol. 2, 760.
(*u*) Roberts v. Scoones, 7 Sim. 418. (*x*) Burne v. Breen, 1 B. & B. 308.

upon real estates, the whole benefit of which he might have had under the original bill, Lord Thurlow gave the costs of the cross bill out of the real estate, which, in effect, fixed them upon the heir. (*y*)

But, although where an heir is brought before the Court as a defendant, he may, under the circumstances suggested, be deprived of his costs, yet this Court will not give costs against him, even though he should insist upon the will's being fraudulent, or the testator being insane, and an issue is directed at law to try the fraud or insanity, and he fails in the attempt of overturning the will. (*z*) It must be a very strong case which will induce the Court to give costs against the heir, such as spoilation or secreting the will, (*a*) or where he vexatiously contests the will by setting up a case of insanity, knowing the devisor to be perfectly sane. (*b*)

It is to be remarked, however, that it is, in general, in those cases only in which the heir-at-law comes before the Court as a defendant, that he is considered as entitled to his costs as a matter of course, where he assumes the character of a plaintiff and seeks to impeach a will on the ground of insanity, or upon any other ground upon which he might impeach it by ejectment at law, he will, if unsuccessful, be ordered to pay the costs, (*c*) and this even though he be an infant; "because he may, notwithstanding, bring a bill on coming of age, or ejectment; indeed it is not certain whether another *prochein amy* may not bring a bill." (*d*)

It is only, however, in cases in which the heir might have proceeded at law that he will be liable to costs if his bill be dismissed; where that is not the case, he will not be compelled to pay the costs: the Court, in fact, considers that an heir-at-law, *contending for his inheritance upon fair grounds [*12] shall not pay the costs, though he do not succeed in establishing his right; and, therefore, where the testator, previously to making his will, conveyed his estate to a trustee, upon trust to convey it as he, the testator, should direct by his will, and the heir filed a bill to impeach the will, which was dismissed, Sir J. Leach, M. R., determined that, as the circumstance of the trust rendered it necessary for the heir to come into equity, the dismissal should be without costs, although he ordered the heir to pay the costs of an issue which had been directed and in which he had failed. (*g*)

From analogy to the case of an heir-at-law, brought before the Court for the purpose of having a will of his ancestor established against him, Courts of Equity appear to have adopted the rule that where a bill is filed by an occupier or owner against a vicar or rector, to establish a modus, the vicar or rector shall have the costs of the proceeding, unless he disputes the modus; therefore, where a bill was brought against a rector to establish a modus, and he, by his answer submitted to it, the Court established the modus, and ordered the plaintiff to pay the rector his costs of suit, notwithstanding such suit might have been con-

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(*y*) Leacroft v. Maynard, 3 Bro. C. C. 233, and *vide* Beames on Costs, 63.

(*z*) Webb v. Claverden, 2 Atk. 424; Smith v. Dearmar, 3 Y. & J. 278.

(*a*) Berney v. Eyre, 3 Atk. 387.

(*b*) White v. Wilson, *ubi supra; ante*, vol. 2, p. [illegible]

(*c*) Webb v. Claverden, *ubi supra;* Seal v. Bro[illegible] 3 Bro. C. C. 214; Johnston v. Gardiner, 1 Dick. 313.

(*d*) Blinkehorne v. Feast, 1 Dick. 153; 2 Ves. 27; S. C.

(*g*) Scaif v. Scaif, 4 Russ. 309; *vide etiam*, Tatham v. Wright, 2 R. & M. 1–32. It seems, from some early cases, to have been the doctrine of the Court, that an heir-at-law, or heir male of the honour of a family, has a right to come into equity for a production and inspection of the deeds by which he is disinherited, and that, if he does so, he will not be liable to costs. *Vide* Leman v. Alie, Amb. 163; Harrison v. Southcote, 2 Ves. 496, 1 Atk. 539; Earl Suffold v. Howard, 2 P. Wms. 176; Shales v. Barrington, 1 P. Wms. 481.

sidered as having been, in some measure rendered necessary, by the rector having previously filed his bill for tithes, which had been dismissed with costs; (*i*) and so where a bill was filed against a vicar, who declined an issue to try the modus, the decree established the modus and directed the plaintiff to pay the vicar his costs. (*k*) It seems, however, that, in cases of this description, if the rector or vicar dispute the modus, and it is established against him, he will not [*13] be entitled to his costs, though costs will not be awarded against him, (*l*) unless *he prays an issue, in which case he will be ordered to pay the costs at law, but not those in equity. (*m*) Where, in a case of this description, several issues are directed, some of which were found for the plaintiff and others for the defendant, each party was allowed the costs of the issues found in his favour. (*n*)

Where a plaintiff, in a bill to establish a modus, submitted to an issue to try it, but afterwards withdrew the issue, which was thereupon taken *pro confesso* against him, the Court of Exchequer dismissed the bill with costs, although it was contended that as two preceding vicars had each received a composition for the space of forty-five years, and the modus set up had been more rank than any that had ever been established, there was sufficient doubt to justify the plaintiff in filing his bill. (*o*)

Another case in which the Court generally gives costs to the party, without reference to his success in the suit, is that of a mortgagee or other incumbrancer having a specific lien upon property; the principle of the Court being, that where the owner comes to deliver the estate from the incumbrance which he himself, or those under whom he claims, had put upon it, the person having that pledge is not to be put to expense with regard to that proceeding, and so long as he acts reasonably as mortgagee, to that extent he ought to be indemnified. (*p*)

This principle has been applied, also, to those cases in which, although the transaction between the parties did not originally consist in borrowing or lending money or charging an estate with a particular sum, the Court has thought proper to consider a party advancing money in the light of a mortgagee or incumbrancer. The cases to which I allude are those in which it orders securities to be delivered up, or sales of reversionary interests to be set aside, because the bar- [*14] gain *has been unconscientious; in these cases the Court generally decrees for the plaintiff, upon terms, that he shall repay the defendant the amount actually advanced or paid by him, with interest; and looking upon him as a mortgagee for that amount, it further treats him as such, by ordering the plaintiff to pay him his costs. (*q*)

Upon this principle, where an apothecary gave his patient 50 guineas to receive 500, or an annuity of 100 if he should survive a year, which he did; upon a bill, brought by the apothecary against the executors, Lord Thurlow dismissed the bill; but as, upon a bill to set aside the agreement, the apothecary must have received back his money, he dismissed it without costs. (*r*)

(*i*) Berners v. Hillet, 3 Gwil. 871. (*k*) Cleeves v. Knyfton, 3 Gwil. 1048.

(*l*) Clifton v. Orchard, 1 Ath[illegible]10.

(*m*) Ibid; *vide etiam* Cleeve[illegible]nyfton, *ubi supra;* and Beames on Costs, ed. 1840, p. 46, cases there cited.

(*n*) Prevost v. Bennett, 2 Pri. 272.

(*o*) Brookland v. Golding, Wightw. 100.

(*p*) Detillin v. Gale, 7 Ves. 584; Loftus v. Swift, 2 Sch. & Lef. 642; Taylor v. Baker, Dan. Ex. Rep. 71.

(*q*) Peacock v. Evans, 16 Ves. 512; Gowland v. De Faria, 17 Ves. 20; Bowes v. Heaps, 3 V. & B. 117.

(*r*) Priestly v. Wilkinson, 1 Ves. J. 214.

It is to be observed, that, at law, after a mortgage is forfeited, the estate is the absolute property of the mortgagee, and he may deal with it as his own; he may sell it, or incumber it, or devise it; if, therefore, the mortgagor applies to a Court of Equity for redemption, it is only granted to him upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts; therefore, a mortgagor filing a bill to redeem must pay the costs not only of the mortgagee himself but of all persons claiming under him. (*s*)

The same rule applies to a foreclosure, as well as a redemption, (*t*) and it is to be remarked that, upon the question of a mortgagee's costs, it in general makes no difference whether the bill is filed by the mortgagor to redeem or by the mortgagee to foreclose; in either case the mortgagee is entitled to his principal, interest, and costs. Thus where a mortgagee assigned his mortgage money to the trustee of his settlement, and afterwards filed a bill of foreclosure against the mortgagor, to which the trustee was made a party, he was ordered to pay the costs of the trustee and to add them to the mortgage debt. (*u*)

A mortgagee, it is to be remarked, will not only be allowed *his own costs, and the costs of those claiming under him, but he will [*15] be allowed all costs which he may have incurred in asserting or defending his right under the mortgage; thus, where a mortgagee had filed a bill of foreclosure, he was allowed the costs he had incurred in procuring administration to an annuitant under the will of the mortgagor, such annuitant being a necessary party to the foreclosure. (*x*) So where an infant claiming under a mortgagor had endeavoured to defeat the mortgage by setting up a supposed entail, and after a special verdict, and a great agitation at law, the mortgagee prevailed, whereupon the infant brought his bill to redeem, and the mortgagee swore that he had expended above £120 in defending his mortgage at law, although he had but £60 costs allowed him there, it was held that he should not be held down to his taxation at law, but should, upon the account, be allowed all he had laid out or expended. (*y*) And it appearing that the mortgagee, fearing his mortgage would have been defeated at law, got administration as creditor in the Ecclesiastical Court, he was allowed his costs expended there also. (*z*)

And so in another case, where a first mortgagee, after he had been put to great expense in suits to foreclose, and otherwise, in respect to the estate, had a bill filed against him by a second mortgagee to redeem, the Court ordered that his costs should not be taxed as in an adversary suit, but that he should be allowed all his costs and expenses, as is done in the case of a solicitor who lays out and disburses money for his client, the rents to be applied, in the first place, to pay such costs before they were applied to sink the principal. (*a*) And in a recent case on a bill for redemption, the Master of the Rolls, (Sir J. Leach,) gave to the mortgagee, the costs of an action which he had brought against a person who had joined the mortgagor in a bond for the mortgage money, the fruit of the action being lost by the insolvency of the estate; and his Honor *stated the principle to be, that the mortgagee was entitled to be [*16] allowed in account, against the mortgagor, all expenses properly incurred for the recovery of the mortgage money. (*b*)

Upon the same principle it is stated, that if a mortgagee or real creditor, is brought before the Court to have his security im[illegible]ed, if the bill is dismissed there is hardly an instance in which it is not with costs, for, being brought

(*s*) Wetherell v. Collins, 3 Mad. 255.
(*t*) Bartle v. Wilkin, 8 Sim. 238.
(*u*) Ibid.
(*x*) Hunt v. Fownes, 9 Ves. 70.
(*y*) Ramsden v. Langley, 2 Vern. 536; 1 Eq. Ca. Abr. 328.
(*z*) Ibid. But a mere equitable mortgagee will not be entitled to the costs of defending his right of possession at law; Dryden v. Frost, 3 M. & C. 670.
(*a*) Lomax v. Hide, 2 Vern. 185.
(*b*) Ellison v. Wright, 3 Russ. 458.

before the Court without just grounds, the Court would not do him justice, unless costs were given to him, as he is a creditor and incumbrancer. (*c*)

In *Brodie* v. *St. Paul*, (*d*) however, where certain mortgagees and trustees were brought before the Court upon a bill for a specific performance of an agreement for a lease, not for the purpose of impeaching their title, but as necessary parties to confirm the lease, and the bill was dismissed against the principal party, but, on account of the hardship of the case, without costs. The mortgagees and trustees were refused their costs; Mr. Justice Buller, who heard the cause, saying, that if the decree had been for the plaintiff, perhaps he might have given the trustees their costs, because he could have given them over against the other defendants; but that, as it was, they must have their remedy against their principal.

It is to be observed, that the rule that the mortgagor is to pay the costs of the mortgagee and of those made necessary parties by his act, does not apply where their claims are adverse to each other; thus, where the plaintiff was devisee of a mortgagee, and filed his bill against the mortgagor for a foreclosure, making the heir-at-law of the mortgagee a party to a bill to redeem in order to have the will established against him, Sir L. Kenyon, M. R., thought the estate ought not to be burthened with his costs. (*e*) So where the mortgagee, after bill of foreclosure filed, became insolvent, the costs of his assignee, made a defendant, were not thrown on the mortgaged estate. (*f*) And, in general, if a mortgagee, after a decree to account, assigns his interest to another, the costs of the *supplemental bill necessary to bring the assignee before the Court must be paid by the mortgagee. (*g*)

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The rule that a mortgagee is to have the costs of those claiming under him, is also subject to another exception in cases where he is a lunatic; in such cases the Court has decided that the costs of a committee of a lunatic mortgagee, requisite to enable him to convey to the mortgagor under the statute, (*h*) including the costs of the reference, are to be paid out of the lunatic's estate, whether the application be made by the mortgagor or by the committee, which is the usual course. (*i*)

The right of a mortgagee or incumbrancer to his costs will prevail in cases in which the Court directs a sale of the property pledged; thus, if a mortgagee files a bill against a mortgagor and subsequent mortgagees to foreclose, but, at the hearing, consents to a sale, he will be entitled to the payment of his costs, before the subsequent mortgagees receive any part of their principal, interest, or costs, the practice of the Court being to direct each mortgagee to be paid his principal, interest, and costs, according to his priority. (*k*) This position is at variance with the rule laid down by Lord Erskine in *Kenebel* v. *Scrafton*, (*l*) which is stated to have been incorrect, but appears to be in accordance with the principle of the Court as laid down by Lord Keeper Henley in *Belchier* v. *Butler*, (*m*) viz: that the rights of the mortgagees are not altered by turning the mortgaged estate into money, for the Court directs the money to be applied

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(*c*) *Per* Lord Hardwicke, Taner v. Ivie, 2 Ves. 466, 468.
(*d*) 1 Ves. J. 326. (*e*) Skipp v. Wyatt, 1 Cox, 353.
(*f*) Horan v. Woolongham, Beat. 1. (*g*) Barry v. Wray, 3 Russ. 465.
(*h*) 1 W. 4, c. 60, s. 3, repealing and re-enacting Stat. 6 Geo. 2, c. 10, & 2 Geo. 4, c. 114.
(*i*) *Ex parte* Richards, 1 J. &. W. 264; *vide etiam*, *Ex parte* Brydges, Coop. 290, where it is stated to be the rule that the costs of the committee of a lunatic trustee, conveying under the act, are to be paid out of his estate; the practice, however, appears to be different upon applications under the statute, rendered necessary by the infancy of the trustee; *Ex parte* Cant. 10 Ves. 554.
(*k*) Upperton v. Harrison, 7 Sim. 444. (*l*) 13 Ves. 370.
(*m*) 1 Eden. 523.

according to the rights of redemption, and was acted upon by the Vice Chancellor, Sir L. Shadwell, in *Upperton* v. *Harrison*, above referred to, where the produce of the sale, not being sufficient to pay the principal and interest due to the first mortgagee, his Honor directed the *whole fund to be paid over to him. The same rule has been acted upon in other cases,(*m*) [*18] and has been applied to incumbrances of a different description; thus, where a legacy was charged upon land, and the legatee filed a bill to raise the amount by sale of the estate, to which bill a person to whom the residuary devisee had mortgaged the estate, was made a party, and it appeared by the Master's report that the produce of the sale was not sufficient to pay the legacy in full, the Court refused to give the mortgagee of the residue his costs out of the fund. Where, however, after an equitable mortgage, the mortgagor died leaving an infant heir, and the Court directed a sale, the personal estate being insufficient, and ordered the infant to join in the requisite conveyances, his costs of suit and of executing the conveyances, were directed to be paid out of the proceeds, although they were insufficient to satisfy the mortgagee. (*n*)

It is to be observed, that this rule will not apply where the suit is instituted by a subsequent incumbrancer to ascertain priorities, &c., making a prior mortgagee or incumbrancer a party. In such case the subsequent incumbrancer ought to offer by his bill to redeem the prior incumbrances, and, if he omits to do so, the prior incumbrancer has a right to insist upon being dismissed with costs. But if the prior incumbrancer, instead of asking to be dismissed, consents to a sale and to take his principal and interest out of the proceeds, as he thereby adopts the suit and takes the benefit of it, he must contribute to the costs of it; therefore the costs of all parties will be paid out of the fund, even though there may not be enough left to pay the prior incumbrancer his principal and interest. (*o*)

The rule above laid down, that a mortgagee or incumbrancer is entitled to his costs as well as to his principal and interest, is liable to exception, also, in cases in which the *Court considers the party guilty of any misconduct with reference to the suit, or the subject of it. In *Detillin* v. [*19] *Gale*, (*q*) Lord Eldon said "Though a mortgagee, acting reasonably as such, is to have his reasonable expenses, it does not follow that he can claim his own expenses from other persons, with whom he is litigating, with regard to those acts which, upon his part, are not only unreasonable but grossly oppressive." In that case the mortgagee was deprived of his costs of that part of the suit where he had been guilty of improper conduct, viz: being a solicitor, he had taken a security for his bill without any settlement of account, and had vexatiously occasioned great delay and expense in the progress of the suit. (*r*) So where a mortgagee set up an unjust defence, insisting on his deed as an absolute purchase, he was deprived of his costs. (*s*)

In *Detillin* v. *Gale* above referred to, Lord Eldon appears to have expressed an opinion, not only that a mortgagee might be deprived of his costs, but that, under some circumstances, he might be called upon to pay costs. He said,

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(*m*) *Vide* Davies v. Topp, Seton on Decrees, 97; Wilde v. Clarke, ibid. 105: Geary v. Geary, ib. 173; Wakeham v. Lome, ib. 275; Tonkin v. Roberts, Reg. Lib. B. 1742, fo. 628.

(*n*) Bibby v. Shufflebotham, Beames on Costs, ed. 1840, p. 30.

(*o*) White v. Bishop of Peterborough, Jac. 402; *vide etiam* Brace v. The Duchess of Marlborough, Mos. 50; Pace v. Marsden, Seton on Decrees, 274.

(*q*) 7 Ves. 583.

(*r*) Beames on Costs, (ed. 1840,) p. 27. More than a sixth part being taken off his bill, he was ordered to pay the costs of so much of the suit as related to that bill, ib. note (*g*).

(*s*) Francklyn v. Fern. Barnard, 30; *vide etiam* Sevier v. Greenway, 19 Ves. 413; Kirkham v. Smith, 1 Ves. 258.

"it will be an extremely bad precedent to hold, that in no case, a mortgagee can be called upon to pay the costs of the mortgagor; I will not say the Court will not, and am very far from saying the Court ought not, to make that precedent, but it ought to be made upon very great consideration." His Lordship afterwards referred to the case of *Shuttleworth* v. *Lowther*, (*t*) in which Lord Lonsdale, a mortgagee, was made to pay costs (on the ground of a tender and an appropriation of the money, which was paid into the bank and refused,) as affording an instance in which a mortgagee had been made to pay the costs; and there are other cases in the books which may be cited in support of the same proposition. Thus, in **Mocatta* v. *Murgatroyd*, (*u*) the [*20] mortgagee was ordered to pay the costs to the plaintiffs who were indorsees of subsequent mortgages and bills of sale, but he was not to have his costs over against the first mortgagor; in regard, the Lord Chancellor said, that it was not reasonable that he should overrate his pledge with costs occasioned by his unjust defence; (*x*) and the principle has been recently acted upon in *Harvey* v. *Tebbutt*, (*y*) where a mortgagee, who had resisted the right to redemption, by setting up a decree of foreclosure collusively obtained, was decreed to pay so much of the costs as was occasioned by his resistance.

In *Hamerton* v. *Rogers*, (*z*) where a mortgagee by his bill of foreclosure attempted to tack a bond to a mortgage against creditors, his bill was to that extent dismissed with costs; and in *Stokoe* v. *Robson*, (*a*) where the difficulty in the suit was occasioned by the loss of the mortgage deed, the mortgagee was ordered to pay the costs.

But although a mortgagee may, under peculiar circumstances, not only be deprived of his costs, but be ordered to pay them, there must be positive misconduct on his part to bring such a visitation upon him; (*b*) the mere circumstance that he has extended his claim beyond what the Court finally decides he is entitled to, will not be a ground for refusing him his costs, (*c*) and, although he may have suggested a doubt as to the mortgagor's title to redeem, yet, if the Court thinks there is sufficient ground for entertaining such doubt, he will not be charged with the costs even where his doubt eventually proves unfounded. Thus, where on a bill, by a devisee, to redeem, the mortgagee insisted that the heir of the mortgagor was alive, and, upon a reference, the Master reported him to be dead, whereupon an issue was directed to try whether he was living or dead, upon the trial of which the jury found that he was dead, *the [*21] Vice Chancellor, Sir J. Leach, determined that the mortgagee must not pay the costs of the issue, as he could not be charged with vexation in a case where the Court thought there was so much weight in his objection as to direct an issue. (*d*)

It may be collected, also, from several cases, (*e*) that the right of a mortgagee to his costs is not defeated by the circumstance of his having remained in pos-

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(*t*) Cited ib. 586; it is somewhat singular that in referring to the same case in —— v. Trecothick, 2 V. & B. 181, his Lordship appears to have thought Lord Thurlow's decision to have been different from that which he stated it to have been in the case in the text, and to have expressed his dissatisfaction with it, saying that he should have had no difficulty in giving the mortgagee his costs.

(*u*) 1 P. Wms. 393.

(*x*) *Vide etiam* Baker v. Wind, 1 Ves. 160; England v. Codrington, 1 Eden, 169; Lord Cranstown v. Johnston, 5 Ves. 277; Taylor v. Baker, Daniell's Exch. Rep. 71.

(*y*) 1 Jac. & W. 197.

(*z*) 1 Ves. J. 513.

(*a*) 19 Ves. 385.

(*b*) Loftus v. Swift, 2 Sch. & Lef. 642, 657.

(*c*) Ibid.

(*d*) Wilson v. Metcalfe, 3 Mad. 45.

(*e*) Owen v. Griffith, 1 Ves. 250, Ambl. 520, S. C.; Trimleston v. Hamill, 1 B. & B. 377; and Wilson v. Metcalfe, 1 Russ. 530; *sed vide contra* Woodroft v. Soys, MSS. cited Beames on Costs, ed. 1840, p. 26.

session of the estate after the rents and profits received by him have been sufficient to pay off the principal money and interest due upon the mortgage; the estate being considered as much a security for costs as for the principal and interest; and a decree for costs almost necessarily following a decree for payment of principal and interest. (*f*) If, however, a mortgagee in possession files a bill for a foreclosure, and it turns out, on taking the account, that on the day on which the bill was filed (to which time the account will be directed,) nothing was due to him, he must bear the expense of the suit. (*g*)

In coming to a decision upon the subject of costs, the Court is frequently governed by its wish to discourage unnecessary litigation. In *Millington* v. *Fox*, (*h*) Lord Cottenham said that he was very much disposed, as a general rule, to make the costs follow the result; because, however doubtful the title may be, or however proper it may be to dispute it, it is but right that the party who really has the right should be reimbursed, as far as giving him the costs of the suit can reimburse him; "but then," his Lordship continued, "there is another object which the Court must keep in view, namely, to repress unnecessary litigation, and to keep litigation within those bounds which are essential to enable the parties to vindicate and establish their rights;" and accordingly his Lordship, although he held *that the plaintiffs were entitled to part at least of the relief they prayed, *i. e.*, a perpetual injunction, refused [*22] to give them the costs of the cause; because it appeared that, before the suit was instituted, the defendants had written to the plaintiffs a letter offering terms which would have rendered the suit unnecessary, which letter, his Lordship held, as to costs at least, rendered it incumbent on the plaintiffs to put to the test, whether the defendants were sincere in their offer, and not to go on with the suit unless they found that they were insincere. (*h*) In the above case, it is to be remarked, that the decision of the Lord Chancellor was influenced by the fact that the defendants had sent their letter to the plaintiffs before the suit was instituted, but it seems that a letter written by a defendant after the institution of the suit may be looked at, as well as the answer, on the question of costs; thus, where an executor defendant, after bill filed, wrote a letter to the plaintiff offering to submit to arbitration, and to pay the sum which should appear to be due, Sir A. Hart, (L. C.,) held that such letter ought to weigh with the Court on the question of the executor's costs, although he had previously denied that any thing was due. (*i*) In a recent case, where a suit had been instituted to recover the amount of a lost bill of exchange, the plaintiff having previously offered an indemnity, it was referred to the Master to inquire whether the indemnity tendered was sufficient, and, upon the Master's reporting that it was a proper indemnity, the defendant was charged with costs subsequent to the hearing, and no costs were given up to the hearing." (*k*)

In the above cases the Court looked at the conduct of the party in endeavouring to put a stop to litigation as a ground for not visiting him with costs. Upon the same principle it has been held that a *tender*, by the defendant to the plaintiff, of the sum due will save the costs of the suit. Thus, although a mortgagee is in general considered entitled to his costs, yet, where he has refused

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(*f*) E. I. Comp. v. Ekins, 2 Bro. P. C. 382; 6 Vin. Ab. 365, Pl. 13; Thomas v. Puddlebury, Sel. Ca. Ch. 51.

(*g*) Binnington v. Harwood, T. & R. 477—485.

(*h*) 3 M. & C. 352.

(*i*) Meader v. M'Cready, 1 Moll. 119.

(*k*) Macartney v. Graham, 2 R. & M. 353.

a tender of principal and interest due, the Court has not only refused him his
[*23] costs, but has ordered *him to pay the costs of the mortgagor. (*i*) The tender, however, must, in such case, be made before the bill is filed; if afterwards, it must be accompanied with a tender of the costs incurred by the mortgagor. (*k*)

And the rule appears to be general that, wherever costs have been necessarily incurred by a plaintiff in seeking a demand, a tender by the defendant to obviate future costs must extend to the costs already incurred. In the Court of Exchequer, where a suit was for the tithes of several articles, and the defendant admitted tithes to be due for all the articles, except one, and moved for leave to pay into Court the value of all the tithes which he admitted, together with the costs of that part of the suit which related to such tithes, the application was refused unless on payment of the whole costs incurred. (*l*)

It is, however, to be remarked, that a plaintiff in refusing to accept a tender of the amount due, because the costs do not form part of the tender, must be careful to ascertain that costs have been actually incurred by him, otherwise he will subject himself to the payment of any future costs which he may occasion to the defendant. Thus, where a plaintiff, as lessee by parol, of an impropriate rectory, filed his bill for tithes, and, in consequence of a demurrer which he had submitted to, had amended the bill by adding the impropriate rector as a party
[*24] but before such amendment was made, the defendant, had tendered *the value of the tithes, which the plaintiff refused to accept without the costs, the Court, on the cause coming on to be heard, (the defendant having proved his tender,) decreed him to pay the plaintiff the money tendered, and the plaintiff to pay to the defendant the costs of the suit, because at the time of the tender no costs were due, the plaintiff having then no title. (*m*)

A tender, to be effective, must be of the whole sum due, and, as has been stated, of the costs, if any have been incurred; and if a tender is refused, and it afterwards appears that the sum actually due exceeds the amount tendered, the defendant will not be exempted from costs. (*n*) A tender must also be specific, and although it may be of a larger sum than is actually due, yet, if such tender is coupled with a direction to the plaintiff to take out of it such a sum as is actually due to him, it will not be good. (*o*) So, also, if the tender be clogged with conditions, which the party has no right to impose, (*p*) it will not be effective to excuse the party making it, from his costs; therefore, where an executor, although he had offered to pay a legacy given to the plaintiff, for her

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(*i*) *Vide* Shuttleworth v. Lowther, cited by Ld. Eldon, in Detillin v. Gale, 7 Ves. 582, 586; *vide etiam* —— v. Trecothick, 2 V. & B. 181; Williams v. Sorrell, 4 Ves. 389.

(*k*) By the Statute 7 Geo. 2, c. 20, a summary remedy is provided for a defendant in a bill of foreclosure, who, under its authority, may, at any stage of the cause, obtain a reference to the Master to ascertain the amount due to the mortgagee for principal, interest, and costs, and, upon payment of the amount may redeem the estate, in the same manner that he may upon a decree made at the hearing, *vide post*, "*Interlocutory Applications.*"

(*l*) Worrall v. Miller, 3 Anst. 632. In the Court of Exchequer, the practice where a defendant in a tithe cause admits certain sums to be due, and is desirous of protecting himself from costs, is to move that the plaintiff shall accept the sums admitted due by the answer or proceed at the peril of costs, and the Court will notice the application by minute; such application can be made, without notice, on payment of the money into Court; Davis v. Moseley, 9 Pri. 211; *vide etiam* Dean and Chapter of Bristol v. Donnesthorpe, 1 Anst. 272.

(*m*) Henning v. Willis, 3 Gwill. 898; Beames on Costs, 67.

(*n*) Taylor v. Hall, 2 Gwill. 611, *notis;* Worrall v. Nicholls, 4 Gwill. 1302; Beames on Costs, 68.

(*o*) Drake v. Brooking, 2 Gwill. 594; and *vide* Rumney v. Willis, 2 Gwill. 775; Beames on Costs, 69.

(*p*) Walter v. Patey, 1 Russ. 375.

life, and afterwards to her children, had qualified his offer, by insisting that it should be laid out in such security as he should approve of, Lord Gifford, M. R., ordered the costs to be paid out of the testator's general estate to which the executor was entitled as residuary legatee, on the ground that the executor had no right to add such a stipulation to his offer.

If a tender is not legal, a Court of Equity will not support it; nor will it supply a defect in a tender against a rule of law, unless, perhaps, where fraud is used to prevent its operation; (*q*) and where parties came into this Court, to be relieved from a legal demand, on the ground that they had made a tender, Lord Hardwicke refused to relieve, because the tender might have been pleaded at law. (*r*)

*It is to be recollected also, that a tender must, as has been mentioned before, (*s*) be proved; a mere statement of it in an answer, [*25] is not sufficient to save the costs.

The principle upon which the Court acts, in admitting a tender, duly proved, as a ground for excusing the party making it from payment of costs, viz: the encouragement of attempts to prevent litigation, will apply to cases of account, where, although from the uncertain state of the account, the accounting party is not able to make a specific tender of the balance due from him, yet, if he has shewn a willingness to render an account, the Court will, upon final adjudication, take such willingness into consideration, and exonerate him from paying the costs to the other party, although the result may be that the balance is against him. (*t*)

Thus, on a bill filed to call a trustee to an account, it was held, by Lord Keeper *Coventry*, that if he by answer submits readily to it, though on the account he be found in debt, yet he shall pay interest for the balance, only from the time of the account liquidated, *and no costs* if he has not misbehaved himself. (*u*) In that case, however, the defendant had said in his answer, he believed the plaintiff considerably indebted to him, and after the matter had depended twenty years, was found £200 in the plaintiff's debt; and the Lord Keeper therefore decreed, that he should pay interest from the time of the bill; "for he had admitted, by his answer, that he had not kept any money for the plaintiff useless or unemployed, and in a manner had dared the plaintiff to the account, and, therefore, must pay the costs, as the plaintiff must have done, if he had been found indebted to him. (*x*) So where a bill was filed against an *elegit* creditor, for an account, who, knowing that the balance was against him, contested the mode of taking the account *and failed, he was ordered to pay such part of the expense of taking the account as [*26] was incurred after his debt was paid off. (*y*)

It is to be observed, that, in the above case, the defendant was fixed with the costs, on the ground that he had improperly contested the mode of taking the account, otherwise he would not have been made to pay them; the rule of the Court being, as we have seen, that an incumbrancer upon an estate is not bound

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(*q*) *Per* Lord Hardwicke, in Gammon v. Stone, 1 Ves. 339.

(*r*) Ibid. (*s*) *Ante*, p. 6.

(*t*) This, however, is not strictly applicable to cases of *mutual* account, in which it is said, that the constant course of the Court is to reserve costs till after the report, that the Court may have it in its power to punish the wrong-doer; *vide* Rider v. Bayley, 8 Bro. P. C. 361, 8vo. Ed.; 6 Vin. 332; 2 Eq. Ca. Ab. 237, S. C.; Beames on Costs, (Ed. 1840,) p. 6.

(*u*) Parrot v. Treby, Prec. in Ch. 254; *vide etiam* Bennett v. Attkins, 1 Y. & C. 247; Ashburnham v. Thompson, 13 Ves. 402; *sed vide* Atty. Gen. v. Brewers' Company, 1 P. Wms. 376.

(*x*) Ibid. (*y*) Skirrett v. Athy, 1 B. & B. 430.

to deliver possession, until his costs are paid, as well as his principal and interest, the estate being as much a security for one as the other. (*z*)

It may be collected, from many of the cases referred to, that the Court regards, in some respects, the granting of costs to a party, somewhat in the light of a testimonial of good conduct; and that it will, generally, withhold such testimonial from a party who has been guilty of any misconduct, with reference to the subject of the suit, (*a*) even where, under other circumstances, that party would have been considered entitled to them. This position is strongly exemplified in the case of mortgagees or incumbrancers, whose *prima facie* right to costs may, as we have seen, be defeated by their conduct. (*b*) And so, although there is no rule more general with respect to costs, than that "where the bill claims, on the ground of fraud, the decree or order of dismission shall, in either event, be with costs," (*c*) yet, where the party succeeding is *particeps criminis*, the Court will not consider him entitled to the costs of the litigation,—as in the case of bills for the delivering up of securities, given upon considerations which are contrary to the policy of the law, such as marriage—brocage bonds, &c.; in such cases, although the Court, acting upon principles of public policy, will set aside the bond at the instance of the husband, yet it will do so, without giving him the costs of the suit which he has instituted for that purpose; and so, where a bill was filed for delivering up a bond, given by the plaintiff to the defendant's wife, in consideration that she [*27] would use the influence *and power she had over the plaintiff's grandfather, (an old man of eighty-two,) to induce him to leave his whole estate to the plaintiff, the Court, although it set aside the bond as being given without consideration, gave no costs on either side. (*d*)

It is to be recollected here, that, in some of those cases in which the Court will interfere to set aside a transaction which is contrary to principles of public policy, it frequently gives costs to the unsuccessful party; the cases alluded to as instances of this departure, are those in which the Court orders securities to be given up or sales to be set aside, on the ground that the bargain is unconscientious, and in which it gives the defendant his costs, (*e*) as well as the principal and interest of the money he has paid. In those cases, however, the Court proceeds upon the ground that the person advancing the money is to be treated as an incumbrancer upon the property, and the decisions cannot, therefore, be considered as infringing at all upon the principles which govern the Court in the ordinary case of frauds. It may be mentioned here, that, in a case before Lord Abinger, L. C. B., where a trustee had purchased trust property and afterwards sold it at a profit, the trustee, although he was compelled to refund the profit he had made, yet, as there was nothing in his conduct to affect him with *moral fraud*, he was not fixed with the costs of the suit. (*f*)

The rule upon which the Court acts in depriving a successful party of his costs, where he has been guilty of fraud or other misconduct of that description, has been extended to cases where there has been an improper concealment not amounting to a fraud. Thus, where a woman, before her marriage, had, for a valuable consideration, entered into a bond for the payment of a sum of money to the defendant, who, at her request, concealed the transaction from her husband, and the husband, after the wife's death, brought a bill to be relieved [*28] from the bond, Lord Hardwicke, although he held that *where a debt is contracted by a wife before marriage, for a valuable consid-

(*z*) *Ante*, p. 21; Owen v. Griffith, 1 Ves. 250; Ambl. 520, S. C.
(*a*) Armstrong v. Blake, 1 Moll. 178.
(*b*) *Ante*, p. 19.
(*c*) Scott v. Dunbar, 1 Moll. 442.
(*d*) Debenham v. Ox, 1 Ves. 276.
(*e*) *Ante*, p. 13.
(*f*) Baker v. Carter, 1 Y. & C. 250.

eration, concealment of it from the husband is no fraud on the marriage, and therefore dismissed the bill, said, that concealment of such debts and securities is not to be encouraged, and that, therefore, he should have excused the husband his costs, on dismissing his bill, had it not been for the circumstance that it was at the request of the wife herself, whose representative the husband was, that the obligee had concealed it from the husband, which, if she had survived her husband, would not have deprived the obligee of his costs.

It may be noticed here, that the Court not only expects that there should be an absence of fraud, on the part of the party applying to it for relief, but even where there has been no positive fraud, but the conduct of the party has not been strictly honourable, it will, in cases where the application is to the discretion of the Court, visit him with costs; (*g*) and so, if a party obtains an unconscionable advantage over another, the Court, although it may not feel itself justified in depriving him of the advantage he has gained, will not give him his costs of enforcing it; therefore, if a purchaser obtains a bargain at an inadequate price, but which the Court may be bound to enforce, it will not give him costs against the seller, whose estate he has obtained at an under value. (*h*)

So where a plaintiff has slept upon his rights for a *great number of years*, and has allowed the defendant to suppose that he would not enforce them, he will frequently, although successful, be deprived of his costs; as, where there had been no demand nor any rent paid for thirty years, but the person who was entitled recovered upon a verdict, Lord Hardwicke said the defendant must pay the costs at law, but as the *laches* arose on the part of the plaintiff, and the obscurity of the title to the rent from the want of a demand for such a length of time, he should not be allowed costs against the defendant in equity. (*i*)

*In like manner where a legacy was given to an infant and the executor advanced moneys during his minority for his maintenance, [*29] and afterwards left him, by his will, a larger legacy than the one to which he was before entitled, upon a bill filed by the infant, ten years after he came of age, against the executor of the executor, claiming payment of the legacy and interest, the Court refused to allow the sums advanced by the executor for maintenance, or the legacy given by the executor, to be set off against the legacy given by the original testator, and decreed it to be paid with interest from the time of filing the bill, but, in consideration of the circumstances and of no demand having been made for ten years, the decree was made without costs. (*k*)

Sometimes, where there has been a misunderstanding between the parties, and the bill is in consequence dismissed, the Court will not give costs to the defendant. Thus, where a bill was filed for a specific performance, and the Court was of opinion that there was no concluded agreement, and that all the correspondence together did not amount to more than a treaty, it dismissed the bill, but, in consideration that it appeared to have been a case of misunderstanding, arising from the want of clear unequivocal conduct and language, it was dismissed without costs. (*l*)

The Court will also refuse costs to a vendor, although it decrees a specific performance at his suit, in cases in which the vendor's own representation has given the purchaser a probable cause of suit. (*m*)

(*g*) Davis v. Symonds, 1 Cox, 402.

(*h*) Burrowes v. Lock, 10 Ves. 470; 3 Sugd. V. & P. Ed. 1840, 147.

(*i*) Anon. 2 Atk. 14. *Vide* Clifton v. Orchard, 1 Atk. 610; Pearce v. Newlyn, 3 Mad. 186; *vide etiam* Guest v. Homfray, 5 Ves. 818.

(*k*) Lee v. Brown, 4 Ves. 362.

(*l*) Stratford v. Bosworth, 2 V. & B. 341; Marquis of Townshend v. Stangroom, 6 Ves. 328.

(*m*) Fenton v. Browne, 14 Ves. 144.

In cases also where one party, upon the construction of a doubtful point of law, has obtained a great advantage over the other, the Court will not give him his costs: as where an annuity was charged upon real estate, payable to the annuitant only upon his own receipt, and the annuitant became bankrupt, whereupon a bill was filed by his assignees against the owner of the estate for the recovery of the annuity, and a *case was directed to the Court of King's Bench, who certified that the annuity had ceased by the bankruptcy,—upon the equity reserved, the bill was dismissed without costs, the Master of the Rolls saying it was a doubtful point, and the defendant had a great advantage by the failure of the bankrupt, but that he would consider of the costs at law. (n)

[*30]

As the Court will not tolerate fraud in any form, so will it discountenance a groundless allegation of fraud in a bill or other pleading, and upon this principle it is that the rule, which has been before referred to, has been established, viz: that where the bill claims on the ground of fraud, an order of dismission shall be with costs; (o) and so, although a plaintiff may fail in establishing his claim, yet if the defendant has set up fraud or misrepresentation as a defence, which are disproved, he will be made to pay the costs occasioned by that defence, (p) for "it is the duty of the Court to discourage the abuse of its proceedings by the introduction of imputations disgraceful to character, which prove to be altogether unfounded." (q)

Where the conduct of both parties has been equally reprehensible, the Court will also abstain from giving costs in favour of either party. Thus, where the Master, under a reference to inquire into a vendor's title, reported that the abstract delivered by the vendor before the filing of the bill was sufficient, but he found that the purchaser required certain evidence in support of the abstract, some of which was necessary but not furnished, and some not necessary, the Lord Chancellor decided that both the parties were in the wrong; and upon the vendor's bill he held that no costs ought to be given on either side. (r)

Where, however, the vendor had failed in making out his title, upon an objection to the abstract originally taken by the purchaser, but afterwards succeeded in establishing it upon another ground, the Court, although it directed the performance of the contract, gave the costs to the purchaser. (s)

*And where both parties had been equally foolish, the one in selling and the other in buying an estate, which was liable to be defeated upon a contingency, which contingency had actually happened before the contract was entered into, the Lord Chief Baron (Richards) although he set aside the contract, ordered each party to pay their own costs. (t)

[*31]

We have seen above, that, in cases where the unsuccessful party has done all in his power to prevent litigation, either by offering a reference to arbitration or making a tender, or taking some step of that nature, the Court will not compel him to pay the costs of a suit which he has endeavoured to avoid; still the Court is not so unreasonable as to expect him, for the purpose of avoiding litigation, to relinquish any right he may fairly be supposed to have; and it will therefore, if it appears that a party in resisting or asserting a claim, had *probabilem causam litigandi*, excuse such party from payment of costs, although the ultimate decision of the Court may be against him. (u)

(n) Dommett v. Bedford, 3 Ves. 149. (o) *Ante*, p. 26; Scott v. Dunbar, 1 Moll. 442.
(p) Wright v. Howard, 1 S. & S. 190. (q) Ib. 206.
(r) Newall v. Smith, 1 J. & W. 263. (s) Fielder v. Higginson, 3 V. & B. 142.
(t) Hitchcock v. Giddings, Dan. Ex. Rep. 1; 4 Pri. 135, S. C.
(u) Curs. Canc. 346. In Lord Bacon's Ordinances, 54, it is laid down, that, in all suits where it shall appear, upon the hearing of the cause, that the plaintiff had not *probabilem causam litigandi*, he shall pay unto the defendant his utmost costs to be assessed by the Court. Beames's Ord. p. 24.

Thus it has been said, that, in suits for the specific performance of agreements for the sale or purchase of estates, the circumstance of the title being bad, only makes a *primâ facie* case for costs, which is capable of being rebutted by circumstances; (*u*) and in *Staines* v. *Morris*, (*x*) Lord Eldon remarked, that, as to the costs of a suit in equity, although it was in many cases very hard that they should follow the event of the cause, yet all his experience had persuaded him that it was much to be wished that it was so, but that certainly it was not the present course of the Court, and that where there is a fair case for consideration, it is not the course to visit the party who fails with costs. In that case, his Lordship, although he held that the purchaser was wrong in resisting a covenant which he was bound to enter into, yet as the Master's opinion had been the other way, and the Judges at law would not decide the case until they had the opinion of the Court of Chancery, *and professional men had differed upon the question, it would, he said, be too presumptuous in him to set such a value upon his own opinion, by marking the resistance of the purchaser with costs, and therefore he made the decree without costs. (*y*) [*32]

Upon the same principle, where a bill was filed against a purchaser for the specific performance of his agreement, and the question turned upon a point of law which had been determined in favour of the plaintiff's view, by the Court of Exchequer, Lord Loughborough, although he differed from the Court of Exchequer, and therefore felt himself compelled to dismiss the plaintiff's bill, yet, as he could not make a purchaser take a title in the face of the decision of the Exchequer, he dismissed the bill without costs. (*z*) And so in *White* v. *Foljambe*, (*a*) Lord Eldon dismissed the bill without costs, the ground of his judgment, as his Lordship afterwards (*b*) said, being, that the question was a pure question of title; which raised very considerable difficulties in the minds of those most capable of judging upon such a subject.

And so where the Master had reported in favour of the plaintiff's title, and exceptions were taken to his report, upon the hearing of which the Court thought the title too doubtful, an order was made dismissing the plaintiff's bill, but without costs, returning to the purchaser his deposit on filing the exceptions. (*c*)

But although the Court will not in general visit a party with costs, who resorts to the Court in a doubtful case, where he has *probabilem causam litigandi*, yet if he is absurd enough to refuse a fair offer of accommodation, and obstinately persists in his suit, it is an aggravation, and his bill shall be dismissed with costs. (*d*) And wherever the doubt has been occasioned *by the conduct of the party himself, the Court will deprive that party of his costs, though he succeed in the suit. (*e*) [*33]

It is to be noticed that where the Court comes to a decision upon a point of law which is contrary to a former decision, either of this Court, or of any other of competent jurisdiction, it will generally exonerate the party against whom it

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(*u*) Edwards v. Harvey, Coop. 40.
(*x*) 1 V. & B. 8, 16.
(*y*) *Vide* 3 Sugd. V. & P. Ed. 1840, 87.
(*z*) Rose v. Calland, 5 Ves. 187.
(*a*) 11 Ves. 337.
(*b*) *Vide* ibid. 463.
(*c*) Willcox v. Bellaers, T. & R. 491. In this case the exceptions only had been set down for hearing, and not the cause, upon further directions, the consequence of which was, that the bill could not then be dismissed. The difficulty, however, was got over, by ordering the exceptions to stand over for judgment, and then the defendant obtained an order by petition, that the cause should be set down to be heard upon further directions and costs, and that it should be advanced to be heard together with the exceptions which stood for judgment. Ib. 495.
(*d*) *Per* Lord Hardwicke in Biggleston v. Grubb, 2 Atk. 48.
(*e*) Blunt v. Cumyns, 2 Ves. 331.

decides, from the payment of costs to his adversary, as in the case of *Rose* v. *Calland*, (*e*) above referred to; but where the point has been decided before, and the Court thinks that the decision was correct, it will, if the party, against whose interest the decision is, had notice of the previous determination, fix him with the costs of the litigation; thus where a bill was filed for a specific performance, and the purchaser set up an objection to the title which had already been decided in a former case, of which the purchaser had notice, the purchaser was decreed to pay the costs of the suit. (*f*)

And here it may be remarked that, in suits for specific performance, it is not the mere failure of an objection, taken by the purchaser to a title, that will fix him with costs, a purchaser is considered as entitled to take a fair objection; and, although it be over-ruled, yet the Court will not, on that ground, give costs against him; (*g*) this, however, must always depend upon the weight which the Judge may think due to the objection. (*h*)

It is, however, only where the case turns upon a question of law, upon which the opinion of the Court may be fairly taken, that the unsuccessful party will be excused his costs; if there is a decided objection to the case set up, the party setting it up will be compelled to pay them; thus where a vendor sells an estate, his title to which is clearly bad, the Court will dismiss his bill with costs; (*i*) [*34] and this it will do even where *the defect has been occasioned by an accident, as where the title deeds were burnt, after the contract: (*k*) and it seems that if there is one decided objection to the plaintiff's case, which prevails, the circumstance, that the defendant has taken others which have failed, will not relieve the plaintiff from his costs; thus where a purchaser obtained an issue upon a question of pedigree in which the vendor failed in establishing his title, the bill was dismissed with costs, although the purchaser had taken several objections before the Master, and had only succeeded in the one relating to the pedigree, the Court observing, that, although the objections were over-ruled, they might have been very properly made, though an answer was given to them and they were removed. (*l*)

The rule upon this subject is very clearly laid down by Sir J. Leach, V. C., in *Thorpe* v. *Freer*. (*m*) "If a purchaser makes the suit necessary by a frivolous objection to the title, he must bear the costs which he has improperly occasioned; but if he states a serious objection, as to which it is reasonable that he should have the title fortified by the opinion of the Court, the Court will not compel him to pay costs although the objection fails. The principle must be the same with respect to the purchaser's suggestion of doubt as to matter of fact." (*n*)

It seems, however, that if the Court thinks an objection groundless, although it was supported by the opinion of counsel, upon which the purchaser acted, yet the party taking it will be compelled to pay the costs; for the Court cannot

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(*e*) 5 Ves. 186. (*f*) Biscoe v. Wilks, 3 Mer. 456.

(*g*) 3 Sugd. V. & P. ed. 1840, 141, *et vide* Cox v. Chamberlain, 4 Ves. 631; Staines v. Morris, 1 V. B. 8; Sharp v. Roahde, 2 Rose, 192.

(*h*) 3 Sugd. V. & P. *ubi supra, et vide* Burnaby v. Griffin, 3 Ves. 266; Bishop of Winchester v. Paine, 11 Ves. 195; Powell v. Martyr, 8 Ves. 146; Fludyer v. Cocker, 12 Ves. 25; Calverley v. Williams, 1 Ves. J. 210.

(*i*) Playford v. Hoare, 3 Y. & Jerv. 175.

(*k*) Bryant v. Busk, 4 Russ. 1. In that case, the Court seemed inclined to make an order that the plaintiff should concur with the defendant in giving an order to the auctioneer to return the deposit paid by the defendant at the sale of the estate.

(*l*) Edwards v. Harvey, Coop. 40; *vide* Townsend v. Champernowne, 3 Y. & C. 505.

(*m*) 4 Mad. 466.

(*n*) *Vide etiam* Aislabie v. Rice, 3 Mad. 256, 260.

allow the mistaken advice of a third person, to operate to the disadvantage of the party who is clearly in the right. (*o*)

And where one of the objections of a purchaser to a title arose from the circumstance, that, on an abstract which had *been made use of on a former occasion, a certain observation appeared, implying a doubt whether a title could be made unless a particular appointment should be executed, and suggesting certain possibilities and probabilities which, if true, would render the title objectionable, Lord Eldon, being of opinion that a good title was made, said, that he should very reluctantly lay down that a notice from opinions in an abstract, or any thing that appears upon a deed, that there may by possibility be reason to suspect (what he could not know, and might not be true) that the title was bad, was such a notice as would affect the purchaser, and that, if the objection was no more than a question of title he should act hardly by the purchaser by not giving the title the credit of making him pay the costs, "for it would help the title." (*p*) [*35]

In most of the cases before stated, the Court, in withholding the costs of the suit from the successful party, has been influenced by the conduct of the party with reference to the suit or the subject matter of it; there are, however, many cases in which the Court, without any reference to the good or bad conduct of any party, has refrained from awarding costs to be paid by the unsuccessful party, solely from consideration of the peculiar hardship of the individual case. Instances in which the Court has, upon this ground, departed from its general principle, are referred to in the note, (*q*) and many others occur in the books; it is, however, useless to state them more fully, since they involve no general principle beyond what has been stated, and depend upon the circumstances of each case as they appeared to the Judge who heard it.

In *Lillia* v. *Airey*, (*r*) the bill was dismissed without costs upon the suggestion of the plaintiff's counsel, acquiesced in by those for the defendant, that the plaintiff was very poor and unable to pay costs.

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*With reference to this part of the subject, it may be stated, that, in cases where Courts of Law have assumed a concurrent jurisdiction with Courts of Equity, but the latter have not relinquished their jurisdiction over the subject, the Court of Chancery will not compel the party who seeks relief under its jurisdiction to pay the costs of his proceeding: thus, where a bill was filed by one partner against another, to enforce contribution, and the Court allowed the case to stand over, in order that an action might be tried at law, which was decided against the plaintiff, the Court, although it dismissed the bill, did so without costs, being of opinion that, although the question was more proper to be tried at law, the plaintiff was very well justified in coming for a contribution, for certainly this Court had never given up its jurisdiction. (*s*) [*36]

On the other hand, in cases in which, after a bill dismissed here, the plaintiff would have had a right to try the question over again at law, the Court, for the purpose of putting an end to litigation, has frequently dismissed the bill

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(*o*) Maling v. Hill, 1 Cox. 186; *vide etiam* Vancouver v. Bliss, 11 Ves. 458.

(*p*) M'Queen v. Farquhar, 11 Ves. 467.

(*q*) Shales v. Barrington, 1 P. Wms. 481; Drybutter v. Bartholomew, 2 P. Wms. 127; Coppin v. Coppin, ib. 291; Forbes v. Taylor, 1 Ves. J. 99; Brodie v. St. Paul, ib. 326; Moseley v. Virgin, 3 Ves. 184; Dickenson v. Lockyer, 4 Ves. 36; Everett v. Backhouse, 10 Ves. 94.

(*r*) 1 Ves. J. 277.

(*s*) Wright v. Hunter, 5 Ves. 792.

without costs, upon the plaintiff's waiving his right to try the question at law; (*t*) a rule which has been usefully applied to suits for specific performance. (*u*)

It is to be remarked, that, in the cases which have been referred to, the Court [*37] has marked its opinion of the conduct of *the parties, principally by withholding from the successful party the costs which, upon general principles, he would otherwise have been entitled to receive from his adversary, and that in no case, save in those of heirs-at-law and mortgagees and incumbrancers, and others partaking of those characters, has the Court compelled the party succeeding in the suit to pay the costs of it. The general rule of the Court, indeed, seems to be, that the successful party, although he may, as we have seen, be deprived of his costs, never pays them. Thus it was held, in *Lewis* v. *Loxham*, (*x*) that, when a bill is dismissed, it is against the principles of the Court to order the defendant to pay the plaintiff his costs. In that case it was ordered to stand over, in order to enable the plaintiff's counsel to search for precedents the other way, but he did not produce any. It seems, however, from the note of the learned reporter, that, in a case before the Vice Chancellor, Sir T. Plumer, his Honor doubted, and seemed to think that a bill might be dismissed, and the defendant at the same time made to pay the costs; (*y*) and it is to be observed, that, in *Cranch* v. *Brisset*, cited in *Wheldale* v. *Partridge*, (*z*) where a bill was necessary to be filed by some person, Sir Thomas Sewell, M. R., ordered the costs to be paid out of the fund, though he felt himself obliged to dismiss the bill. (*a*) It is right, however, to state that, in *Cogan* v. *Stephens*, (*b*) Lord Cottenham, (then Sir Charles Pepys, M. R.) adhered to the rule, that, where the bill is dismissed, the defendant cannot be ordered to pay the costs. In that case, also, it was necessary that a bill should be filed, [*38] and the plaintiff was, in fact, almost the only party by whom *the suit could, properly, be instituted; the fund being in the hands of the defendant as surviving trustee, though, from the conflicting opinions which existed as to the right to the fund, he could not appropriate it, till the claim of the plaintiff had been disposed of, by a decision of the Court.

(*t*) Harnett v. Yeilding, 2 Sch. & Lef. 560; *vide etiam* Lawrenson v. Butler, 1 Sch. & Lef. 21; Buxton v. Lister, 3 Atk. 386; Underwood v. Hithcox, 1 Ves. 279; Leman v. Alie, Amb. 163; Atty. Gen. v. Owen, 10 Ves. 555.

(*u*) Beames on Costs, (ed. 1840,) p. 112. Formerly, it was not unusual in decrees to direct, that, if a party in default should give further trouble to his opponent, the latter should be at liberty to apply to the Court for costs, ibid. 114; *et vide* Harnett v. Yeilding, *ubi supra*. Bradish v. Gee, Amb. 229, Ed. Blunt, n. 6; Leman v. Alie, ib. 163; which cases afford instances in which such a direction was given upon the dismissal of the bill.—For instances in which such clauses have been inserted in decrees with a view to charge the defendant with costs, *vide* Scarborough v. Burton, 2 Atk. 111; Barnard. 255, S. C.; Benson v. The Dean and Chapter of York, Belt's Supp. to Vesey, p. 66; Pearson v. Robinson, Reg. Lib. B. fo. 506; but, in Scarborough v. Burton, Lord Hardwicke appears not to have approved of clauses of this kind, and to have intimated that the question of costs should either be determined or reserved. In that case, however, such a direction having been inserted in the decree, (which was by the Master of the Rolls,) he made the order accordingly.

(*x*) 3 Mer. 429; *vide etiam* Wykham v. Wykham, 18 Ves. 395; Atty. Gen. v. Oglender, 1 V. J. 246; Cooth v. Jackson, 6 Ves. 41; Dixon v. Parker, 2 Ves. 219.

(*y*) Springfield v. Ollett, cited 3 Mer. 430, n. Indeed it appears, from the same note, that, according to the decree in Lewis v. Loxham, Reg. Lib. 1816, B. p. 1059, the defendant was ordered to pay to the plaintiff his costs of a second reference as to title, and of the report thereon, but not of the former proceedings, ib.

(*z*) 5 Ves. 598.

(*a*) *Vide etiam* Davis v. Symonds, 1 Cox. 402; Ash v. Burn, 3 Moll. 97; and Nicloson v. Wordsworth, 2 Swanst. 365, in which Lord Eldon is reported to have said, that when, on a bill by a vendee for specific performance, it appears that the defendant cannot make a good title, there is no further question in the cause than who is to pay the costs.

(*b*) *Vide* Lewin on Trustees, Appx. II. p. 698.

Some cases, however, are to be found in the books, in which the successful party has, under peculiar circumstances, been made to pay the costs; thus, in *Mortimer* v. *Orchard*, (*b*) where the bill was filed for a specific performance of an agreement to renew a lease; the agreement proved by one witness was different from that stated in the bill, whilst the defendants, by their answer, set forth an agreement different both from that proved and that set up by the bill; but a specific performance was decreed according to the agreement stated in the answer, with costs against the plaintiff. (*c*)

The learned author of the Treatise on the Law of Vendors and Purchasers, has also laid it down, that, if a purchaser files a bill for a specific performance, which is dismissed because the defendant, the seller, cannot make a title, yet the bill may be dismissed, with costs against the vendor, (*d*) a doctrine which is supported by a *dictum* of Lord Eldon, in *Nicloson* v. *Wordsworth*, (*e*) that, when, on a bill by a vendee for specific performance, it appears that the defendants cannot make a good title, there is no further question in the cause than who is to pay the costs,—in that case, the bill was filed by the purchaser for a specific performance, insisting that the vendor could not make a good title, and the bill was dismissed with costs; and the corollary, drawn from it by Sir E. Sugden, is, that if a purchaser files a bill for a specific performance, insisting that the seller cannot make a good title, he must pay the costs whether he accept or refuse the title. (*f*)

Another instance of departure from the rule that the successful party is to pay no costs, may be found in the case of a *cestui que trust* making his trustee a defendant to a suit instituted by him against a third party; in that case the *cestui que *trust*, although he obtains a decree against his trustee, must pay his costs, unless the trustee has been applied to, to join in the [*39] suit as co-plaintiff and has refused. (*g*) The proper course to be pursued by a *cestui que trust* who intends to file a bill against a stranger relative to the trust property, is stated to be, to apply to his trustee to become a co-plaintiff indemnifying him against costs, and then, if he refuses, he must abide his own costs as a defendant; (*h*) for it is a rule, that, if a suit is occasioned by the misconduct or obstinacy of a trustee, he may be compelled to pay the whole costs of it. Thus, where a bill for specific performance of an agreement was made necessary by a trustee refusing to join in the conveyance, Lord Thurlow was of opinion that the trustee ought to pay all the costs of the suit, and accordingly directed the plaintiff to pay to the other defendants all their costs of the suit, and recover them over, together with his own costs, from the defendant the trustee. (*i*)

It is to be observed, that, in the case last referred to, the Registrar appears to have doubted whether, according to the practice of the Court, the plaintiff, having been successful against the other defendants, and obtained against them a decree for a specific performance, could, in point of form, be ordered to pay them their costs, but the Lord Chancellor thought that the decree was correct according to the course of the Court: and it is to be remarked that, in fact, no other method exists, by which a defendant who has by his conduct occasioned the suit, can be made to pay the whole costs of it; for the delinquent defendant cannot be decreed to pay the costs of a co-defendant to that defendant himself, for that would in effect be a decree between co-defendants. The only method,

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(*b*) 2 Ves. J. 243.

(*c*) *Vide* the observations on this case, in Beames on Costs, (ed. 1840,) p. 112; *vide etiam* Willis v. Yates, cited ib. 154.

(*d*) 3 Sugd. V. & P. ed. 1840, p. 137.

(*e*) 2 Swanst. 365.

(*f*) 3 Sudg. V. & P. (ed. 1840,) 137.

(*g*) Reade v. Sparks, 1 Moll. 8.

(*h*) Ib.

(*i*) Jones v. Lewis, 1 Cox. 199.

therefore, of effecting the object of compelling the delinquent defendant to pay the costs of the other defendant, is to order the plaintiff to pay them, and then to permit him to receive them again from the defendant whose delinquency has given rise to the litigation. (*k*)

In deciding the question of costs, the Court will frequently apportion them, so as to cause the costs of one part of the *suit to fall upon one party, and those relating to another part, to fall upon the other party; thus, where a plaintiff claims several matters by his bill, and succeeds in establishing his right to a portion only of what he so claims, the Court will sometimes grant him a decree for that part of his case in which he is successful, with costs, to be paid by the defendant, and dismiss the remainder of his bill with costs, to be paid by himself. (*l*)

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So, also, where there are several issues, and some are found for the plaintiff and others for the defendant, the parties will be allowed costs on issues found in their favour, and must pay on those against them. (*m*)

Sometimes, where no part of the bill is dismissed, but a decree is made upon the whole of it, the Court will order the costs of the suit, up to a certain period, to be borne by one party, and the remainder by another. Thus, in suits for specific performance, where a vendor does not make out his title until after the bill is filed, he will be liable to pay the costs of the suit, up to the time when he shewed a good title. (*n*)

And so, where the vendor established his title before the Master, after a contest, upon a different ground from that in the abstract delivered, the Court decreed the costs of the references upon the title, and of the several applications which were made to the Court to the purchaser. (*o*)

In matters of account, also, the Court will frequently apportion the costs between the plaintiff and defendant. Thus, where a plaintiff took a decree for an account against an executor, who had in his answer stated an account, which was found by the Master to be correct, the Court gave the costs of the suit up to the decree to the plaintiff, and the costs of *the subsequent proceedings to the defendant—the reason of the distinction, apparently, being, that the executor had, before the bill was filed, been applied to for an account, but gave none, (*q*) and so had rendered the suit necessary; but it was at the plaintiff's own risk that he proceeded with it, after the defendant had rendered a correct account by his answer.

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In like manner, where a bill is totally dismissed, the Court will sometimes apportion the costs to be paid by the plaintiff, as in the case of *Bruce* v. *Bainbridge*, (*r*) where a bill was filed by a seller, for a specific performance of the contract for sale, and the Master's report was in favour of the title; a case was

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(*k*) *Vide* Acc. Weymouth v. Boyer, 1 Ves. J. 416; Parkes v. White, 11 Ves. 209.

(*l*) *Vide* Clinan v. Cooke, 1 Sch. & Lef. 22. In such cases, also, the Court sometimes contents itself, with making no order at all as to costs, the effect of which is, to throw upon each party, the payment of his own.

(*m*) Prevost v. Bennett, 2 Price, 272.

(*n*) *Vide ante*, vol. 2, 635; 3 Sugd. V. & P. ed. 1840, 140, pl. 13, ib. 143, pl. 23; and *vide* Townsend v. Champernowne, 3 Y. & C. 505; Harford v. Purrier, 1 Mad. 532; Wilson v. Allen, 1 J. & W. 623; Wynn v. Morgan, 7 Ves. 202; Collinge's case, 3 V. & B. 143, n.; Lewin v. Guest, 1 Russ. 328.

(*o*) Fielder v. Higginson, 3 V. & B. 140.

(*q*) Anon. 4 Mad. 273, *et vide* Beames on Costs, (ed. 1840,) p. 7.

(*r*) 3 Sugd. V. & P. 140.

sent to the C. P., and the certificate being against the title, the bill was dismissed with costs, only from the date of the Master's report.

It may be mentioned, in this place, that where, in a cause, the costs are apportioned between the plaintiffs and the defendants, the Court will generally so arrange them, that they may be set off one against the other, and that the balance only shall be paid by the party, from whom, upon setting off such costs, it shall appear to be due. The Court will, also, where there are sums of money to be paid, as well as costs, arrange the demands of each, so as to do justice to all. (*s*) Thus, in *Fell* v. *Lutwidge*, (*t*) where the costs of the suit were thrown upon a trustee, on the ground of fraud, Lord Hardwicke allowed him to set off those costs against the premiums, and other charges he had been at in obtaining a policy of insurance.

So, in a suit for the administration of assets, in which, according to the common course of the Court, all the parties are entitled to have their costs out of the fund, a party who was a debtor to the estate, was not allowed to receive payment of them, whilst his debt remained unsatisfied; but the costs due to him were ordered to be set off, *pro tanto*, against the debt due from him. (*u*)

*The same principle was acted upon by Lord Manners, in *Shine* [*42]
v. *Gough*; (*x*) in that case, the plaintiff had been compelled to resort to a Court of Equity, to be quieted in his possession as against the defendant, who had brought an action of ejectment and obtained judgment, and the plaintiff in equity obtained a decree to be quieted in his possession, with costs; but the decree having omitted to give him liberty to set off the costs in equity, against the costs at law, his Lordship made an order authorizing him to do so.

It is to be remarked, that the application was made to the Court by motion; it was admitted, however, that the order ought to have made part of the decree, and that the omission could, strictly speaking, only be supplied upon a rehearing; but as the form of the application does not appear to have been objected to, and the only point raised was, whether the solicitor's lien upon the costs of the suit, was not a reason for refusing the set off required, (which the Court was of opinion it was not,) the Court granted the motion, in order to save the plaintiff the delay and expense of a rehearing. But, in *Rumney* v. *Beale*, (*y*) where an application, by motion, was made on the part of the defendant, for a special direction to the Deputy Remembrancer, requiring him, in his taxation of the costs of the parties under the decree, to deduct the costs which he should allow the defendant, from the costs which he should allow the plaintiff, the motion was refused. It appeared, that the suit had been instituted for an account of tithes, to some of which the plaintiff was held entitled, and to some not. The Deputy Remembrancer was to take an account and to tax the plaintiff's costs, in respect of those matters to which he was held entitled, which costs, when taxed, were to be paid by the defendants; and the bill as to the other matters, was dismissed with costs, to be taxed and paid by the plaintiffs to the defendants. The plaintiff's costs were taxed at £600; and those of the defendant which they sought to set off against them, at about £60; and the present application was made, in consequence of the plaintiff having become insolvent. It is not stated in the report, upon what *grounds the Court refused [*43]
the motion; (*z*) but it may be assumed, that they were those suggested at the bar, and which are in unison with the doubts which suggested themselves to Lord Manners, in *Shine* v. *Gough*, (*a*) and, as the author sub-

(*s*) Taylor v. Popham, 15 Ves. 72.
(*t*) Barnard, 319.
(*u*) Harmer v. Harris, 1 Russ. 155.
(*x*) 2 B. & B. 33.
(*y*) 10 Pri. 113.
(*z*) Beames on Costs, (ed. 1840,) p. 137.
(*a*) *Ubi supra.*

mits to the strict practice of the Court, viz: that no such set off had been directed by the decree, and that the application should have been made before the decree was passed and acted upon.

It is to be observed that, in the above cases, the costs and the duty were respecting matters in the same suit. Some doubt, has, however, arisen as to whether the Court will set off costs of one suit, against the costs or costs and duty due to the party to pay them, from the person who is to receive them in another.

In Courts of Law, it seems, that parties are allowed to deduct or set off the costs, or the debt and costs in one action, against those in another, and that, not only where the parties are the same, but also where they are in some measure distinct, as where one of the demands for costs has been separate, and the others joint; (*b*) and the rule has also been applied to cases in which the costs required to be set off have been incurred in a suit in equity. (*c*) But this rule, though it proceeds upon equitable grounds, (*d*) and has been approved of by Lord Hardwicke, (*e*) does not appear ever to have been adopted by Courts of Equity. The case of *Shergold* v. *Brewster*, (*f*) has, however, been referred to, by a learned writer upon the subject of costs, as an instance in which the Court of Exchequer has acted upon the principle it involves; (*g*) but it is to be recol-

[*44] lected, *that the Court of Exchequer is a Court of Law, as well as of Equity, and that the application, in that case, may have been made to it in that character. The same observation will also apply to *Gifford* v. *Gifford*, (*l*) and *Smith* v. *Brockblesy*, (*m*) which have been referred to as tacitly conceding that if the solicitor's lien had not intervened, the costs at law might have been set off against the costs in equity; and it is to be noticed, that in a case cited by the same learned author, (*n*) where the application appears to have been made, expressly, to the equitable branch of its jurisdiction, the same Court refused the application. (*o*)

But, whatever may be the practice of the Court of Exchequer, in cases of this description, there can be no doubt, that it is not the practice of the Court of Chancery to allow the costs or duty due from a party in a proceeding in another Court, to set off against the costs due to that party, in respect of proceedings in Chancery. (*p*)

Where a party is entitled to costs, he should take care and apply for them at the hearing, or at any rate before the decree has been passed—as after a decree has been *passed*, the Court will not, on petition, give the costs of the suit to a party, although he was a mere trustee, and as such would have been entitled to

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(*b*) *Vide* Tidd. 9 ed. 991. This practice does not seem to have obtained till lately, in the Court of King's Bench, and that Court will not, in general, suffer the debt and costs in one action, to be set off against those in another, until the attorney's bill is first discharged, although, in the Common Pleas, the attorney's lien for costs is holden to be subject to the equitable claims that exist between the parties in the cause, ibid. 992; and *vide* Taylor v. Popham, 15 Ves. 72.

(*c*) *Vide* Webber v. Nicholas, 4 Bing. 16; *vide etiam* Shergold v. Brewster, Bunb. 29.

(*d*) Hullock on Costs, 991.

(*e*) Gurish v. Donovon, 2 Atk. 165; Barnard. 428.

(*f*) *Ubi supra.*

(*g*) Beames on Costs, ed. 1840, p. 137.

(*l*) Forrest, 109.

(*m*) 1 Anst. 61.

(*n*) Beames on Costs, ed. 1840, 139.

(*o*) Gabet v. Chayter, ib. and *vide* Appx. No. 13.

(*p*) Wright v. Mudie, 1 S. & S. 266; and *vide* Holworthy v. Mortlock, 1 Cox. 202; 2 Bro. C. C. 17, S. C.

them, as a matter of course, if asked for at the hearing. (*q*) Where, however, a trustee did not appear at the hearing, and consequently a decree *nisi* was made against him, without making any provision as to his costs, whereupon he set the cause down again, upon payment of the costs of the day, in the manner already pointed out, (*r*) Lord Kenyon said, the payment of the costs of the day, made the trustee "*rectum in curia*," and as he would most unquestionably have been entitled to his costs, if he had appeared at the original hearing, so he now stood in the same situation, and was therefore entitled to receive them. (*s*)

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*SECTION III. [*45]

Of Costs out of the Fund.

In the last section, an attempt has been made to point out some of the principles by which the Court is governed in awarding the costs of a suit, in cases in which the subject of litigation, not being a fund or estate under the administration of the Court, the costs must necessarily be taken out of the pocket of one party, to be paid into that of another. We shall now proceed to the consideration of those cases, in which an estate, whether real or personal, being the subject of litigation, the Court will order the costs of the suit, or those of some of the parties to it, to be defrayed out of the fund or estate.

It is a rule, that trustees, agents, and receivers, accounting fairly, and paying their money into Court, are entitled to their costs out of the estate, as a matter of course; (*a*) and the same rule extends to personal representatives, (*b*) with regard to whom, as the decisions of this Court shew, that they can only obtain complete exoneration, by having their accounts passed in this Court, (*c*) the Court will give them every opportunity of exonerating themselves, by passing their accounts at the expense of the estate.

This rule is not confined to cases in which they are brought before the Court as defendants; it is a general principle, that a trustee has a right to the protection of the Court, in the execution of his trust; he is therefore entitled to his costs, whether he comes before the Court as plaintiff or defendant, unless the act required to be done leads to no responsibility, or his motive is obviously vexatious. (*d*) And a trustee fairly instituting a suit for the direction of the Court, with regard to the trust, will not only be entitled to his own costs, but any person made a party to the suit, for his protection, will also be ordered his costs from the fund; thus, where a bill *was filed by trustees, for [*46] the direction of the Court, as to the application of a trust fund, in the course of which a dispute arose between the two defendants, whether one of them was illegitimate, and the Master found that he was legitimate,—the other was allowed his costs out of the trust fund. (*e*) "Where," says Lord Hardwicke, (*f*) "a trustee is merely a trustee, and there is any act to be done by him, it is very commendable in him to be cautious; and the Court will con-

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(*q*) Colman v. Sarell, 2 Cox. 206. (*r*) *Ante*, vol. 2, p. 648.
(*s*) Norris v. Norris, 1 Cox. 183.
(*a*) Attorney Gen. v. the City of London, 1 Ves. J. 246; 3 Bro. C. C. 171.
(*b*) Rashley v. Masters, 1 Ves. J. 205.
(*c*) *Vide* Knatchbull v. Fearnhead, 3 M. & C. 122.
(*d*) Curteis v. Candler, Mad. & Geld. 123. (*e*) Hicks v. Wrench, Mad. & Geld. 93.
(*f*) Henley v. Philips, 2 Atk. 48.

sider him entitled to its protection and direction in the execution of his trusts, and will not only never call upon him to pay the costs, unless he refuses to act without suit, or merely from caprice or obstinacy, but will give him his costs out of the trust property, although it appears, in the result, that he might safely have acted without suit." The same doctrine has been held in a recent case; (*f*) and in another case, (*g*) Lord Langdale, M. R., says, I cannot conceive that any thing could be more hard than that executors who are called in to administer estates, where there are doubtful questions arising on the will, and who can be exonerated only by having their accounts passed in a Court of Equity, (*h*) should be deterred from coming to this Court, by being visited with the costs of the proceedings.

Where, however, the act required to be done by a trustee, leads to no responsibility, or his motive is obviously vexatious, he will not be allowed his costs: thus, where trustees under a will refused to pay a legacy to the assignees of a bankrupt, merely because the bankrupt himself had set up a claim to it, Sir J. Leach, M. R., refused them their costs of the suit, because the case was too clear to admit of a doubt; but, as they might have acted from mere ignorance, and not from any improper motive, the Master of the Rolls, although he deprived them of their own costs, would not make them pay the costs of the plaintiff. (*i*)

[*47] So, where a trustee, from caprice or obstinacy, occasions* a suit which would otherwise be unnecessary, he will not be allowed the costs of it, whether he appear in such suit in the character of defendant or of plaintiff; thus, where a person having in his hands a sum of money belonging to an infant, instituted a suit, to have that sum secured for the benefit of the infant, though there was a trustee of a settlement, to whom it ought to have been paid, and who was willing to receive it, Lord Gifford, M. R., refused to allow him his costs out of the fund. (*l*)

Although trustees, or other persons standing in that character, are, as we have seen, generally held entitled to their costs out of the estate, yet they will not be permitted unnecessarily to burthen the fund, by costs which they might have avoided; thus, although two or more trustees, having a fiduciary character, may, notwithstanding they employ separate solicitors, and put in separate answers, have each his costs, (*m*) yet they will not be allowed to make use of this privilege in an oppressive manner; and, therefore, where a trustee, who had not acted, put in a full answer to the whole bill, an order was made at the hearing, to tax him the costs of such answer only as would have been necessary and proper. (*n*) So, where an executor plaintiff made his co-executor a defendant, the Lord Chancellor, for some time, doubted whether he ought to have his costs, but at length they were ordered to be paid to him. (*o*)

Trustees and personal representatives brought into Court, will not be deprived of their costs, although they make a claim for their own benefit and fail, provided they do so "by way of submission." (*p*) But where a trustee has a private interest of his own, separate and independent from the trust, and obliges the *cestui que trust* to come into this Court, merely to hear the point relating

[*48] to his own private interest, determined *at the expense of the trust, this is such vexatious behaviour, on his part, that, for example

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(*f*) *Vide* Taylor v. Glanville, 3 Mad. 176. (*g*) Low v. Carter, 1 Beavan, 427.
(*h*) *Vide* Knatchbull v. Fearnhead, 3 M. & C. 122.
(*i*) Knight v. Martin, 1 R. & M. 70.
(*l*) Ellis v. Ellis, 1 Russ. 368; in general, where a trustee, through his neglect or obstinacy, occasions the suit, he will be ordered to pay the costs of it, *vide post*.
(*m*) *Vide* Reade v. Sparkes, 1 Moll. 10. For the rule as to costs, where they employ the same solicitor, yet put in separate answers, *vide ante*, vol. 2, p. 266.
(*n*) Martin v. Persse, 1 Moll. 146. (*o*) Blount v. Burrow, 3 Bro. C. C. 90.
(*p*) Rashley v. Martin, 1 Ves. J. 205.

sake, he will be decreed to pay the whole costs of the suit. (*q*) Upon this ground, where, on a bill filed for a residue, the defendant, the executor, by his answer, stated declarations of the testatrix, that her other relatives should have no more than their express legacies, and hoped to prove that the surplus was intended for himself as executor, he was made to pay the costs for thus insisting upon the surplus. (*r*)

As the Court will not allow trustees to take advantage of the rule of the Court in their favour, to obtain a determination upon their own rights, so it will not tolerate their attempting to defeat the claims of their *cestui que trust*, by setting up an improper defence; therefore, where the trustees of an estate, bequeathed to them in trust for a charity, insisted that the plaintiffs, under a clause in the will of the founder, (by which it was declared, that if the heirs-at-law should dispute the will, they should forfeit certain annuities thereby bequeathed to them,) had forfeited their annuities by filing the bill, and praying that the trust for the charity might be declared a resulting trust, or in the alternative, that they might have the arrears of their annuity,—Lord Talbot ordered them to pay the costs out of their own pockets, and not out of the trust estate. (*s*)

And so, if a trustee sets up a trust different to what it actually is, the Court will deprive him of his costs, although he does it not to benefit himself, but another. Thus, where the defendant, who was the trustee of her daughter's settlement, upon a question between the husband and wife, whether the wife, who was separated from her husband and lived in a state of adultery, was entitled, under the settlement, to the dividends of a sum of stock to her separate use, insisted, contrary to the fact, that it was the intention of the parties, that a provision for the separate use of the wife, should be introduced into the settlement, Lord Thurlow thought there was ground to deprive her of her costs. (*t*)

*Trustees, will, also, be deprived of their costs if they claim more than they are entitled to: therefore, where the trustees of a [*49] charity insisted, by their answer, that there was £800 due to them from the charity, but the Master reported that £180 only was due them, Lord Cowper refused them their costs, though the balance was in their favour, "forasmuch as they would have surcharged the charity £620." (*u*)

So where a trustee as executor had claimed, by his answer, £156 : 9 : 9, for a bill of costs for business done by him, as solicitor to his testator previous to his death, and had also charged £195 : 10 : 11 for business done after the testator's decease, which bills the Master had reduced, by taxation, to £75 : 10 : 7 and £52 : 17 : 10, respectively, the Court ordered him to pay the costs of the taxation, and refused to give him the costs of the suit. (*x*)

It may be noticed, however, that a disallowance of credit, honestly claimed by an executor, though he is mistaken, is not enough to disentitle him to costs: therefore, where an executor's account was surcharged by the amount of a credit taken for the proportion of an annuity, payable by the testator, during his life, to the executor, but which was not apportionable, the mistake was not considered by Sir A. Hart, L. C., as a ground to deprive the executor of his costs. (*y*)

If a person, standing in the situation of a trustee, by his neglect or misconduct occasions the suit, he will be deprived of his costs out of the estate. (*b*)

(*q*) Henley v. Philips, 2 Atk. 48.
(*r*) Bayly v. Powell, Prec. in Ch. 92; 2 Vern. 361, S. C.
(*s*) Lloyd v. Spillet, 3 P. Wms. 346; 2 Atk. 148, S. C.
(*t*) Ball v. Montgomery, 2 Ves. J. 191.
(*u*) Attorney General v. the Brewers' Company, 1. P. Wms. 376.
(*x*) Dawson v. Parrot, 3 Bro. C. C. 236.
(*y*) Bennett v. Going, 1 Moll. 529. (*b*) O'Callaghan v. Cooper, 5 Ves. 129.

So, also, if a trustee, having taken upon himself the trust, afterwards refuses to act, and thereby renders a suit for the appointment of a new trustee necessary, he will be refused his costs. (*c*)

And if an executor commits a fraud, he will not be allowed his costs, though
[*50] the testator has directed that his executors *shall be re-imbursed any expenses they may incur out of the property. (*d*)

In like manner if a personal representative or other trustee *improperly* retain trust moneys in his hands, he will be deprived of the costs of the suit. (*e*) In order, however, to disentitle him to costs, he must be guilty of some impropriety of conduct, the mere circumstance of his being found in debt to the estate will not be sufficient, even though he may be ordered to pay interest on the balance. (*f*)

In *Travers* v *Townsend*, (*g*) Sir A. Hart, L. C., said he had often heard it stated as a principle, by some of the greatest Judges, that an executor, though in the result made answerable for default, by reason of loss incurred through his neglect, or charged with interest for retaining money in his hands, yet, if there was nothing beyond such negligence, or retention of money against him, was still entitled to the costs of the suit.

So also, although, in general, a trustee committing a breach of trust, which may render an application to this Court necessary, will be deprived of his costs, yet, where the breach of trust consisted of the improper application of a small part of the trust fund, which was promptly offered to be restored, and the suit was for other purposes of the trust, there being no imputation against the trustee, he was held not to be disentitled to his costs. (*h*)

[*51] And where a suit was instituted against an executor and *trustee, with unnecessary haste, without any previous application for the account, or for payment of the balance, Lord Abinger, C. B., although a small balance appeared due from him, allowed him to retain the amount of his costs out of it. (*h*)

In most of the cases above referred to, the Court has contented itself with marking its disapprobation of the conduct of the trustee or personal representative, by withholding from him his costs, to which he would otherwise have been entitled out of fund; it frequently, however, happens that the Court will go further, and will not only deprive the trustee or representative of his costs, but will compel him to pay the costs of the suit out of his own pocket; and it may be stated, as a general rule, that, if any particular instance of misconduct or a general dereliction of duty in a trustee, is the immediate cause of a suit being instituted, the trustee, on the charge being substantiated against him, must pay the costs of the proceedings his own improper behaviour has occasioned. (*i*) Upon this principle, where an executor, directed to lay out the

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(*c*) Howard v. Rhodes, 1 Keen. 581. (*d*) Hide v. Haywood, 2 Atk. 126.

(*e*) Dawson v. Parrot, 3 Bro. C. C. 236.

(*f*) Parrot v. Treby, Prec. in Ch. 254. It appears, from some cases, to have been considered, that where the Court gives interest against executors or other trustees as a remedy for a breach of trust, the costs follow of course; *vide* Seers v. Hind, 1 Ves. J. 294; Rocke v. Hart, 11 Ves. 62; Mosley v. Ward, ibid. 583; but, in Ashburnham v. Thompson, 13 Ves. 404, Sir W. Grant, M. R., in giving costs against executors, whom he charged with interest, went into the circumstances as a ground for it, observing that he did so, seeing the rule laid down in so general a manner in Seers v. Hind, to which he was not quite prepared to accede, as there might be cases in which executors must pay interest which would not be cases for costs; *vide etiam* Bennett v. Attkins, 2 Y. & Col. 250.

(*g*) 1 Moll. 496, *vide etiam* Flanagan v. Nolan, ib. 84.

(*h*) Fitzgerald v. Pringle, 2 Moll. 534. (*h*) Bennett v. Attkins, 1 Y. & C. 249.

(*i*) Lewin on Trustees, p. 452. This rule applies also where corporations are trustees for charities; *vide* Atty. Gen. v Hobert, Rep. t. Finch, 259; Haberdashers' Comp. v. Atty. Gen., 2 Bro. P. C. 370.

testator's personalty in the funds, unnecessarily kept large balances in his hands and resisted the payment of debts, by false pretences of outstanding demands, he was charged with the costs. (*k*) And where an executor retained a balance in his hands longer than was necessary to answer contingencies, he was ordered to pay interest and costs, although it appeared that he always kept a sum ready at his bankers to defray the amount. (*l*)

And where an executor obtained from a legatee a release from a legacy for which no consideration was given, he was ordered to pay the costs of the suit instituted to set aside such release. (*m*)

*It has also been held, that if executors make an unfair appraisement, and otherwise misbehave themselves in their trust they will [*52] be liable to costs. (*n*) And where trustees kept possession of an estate from their *cestui que trust*, whom they considered a lunatic, (but who, although eccentric when he was drunk, was not insane,) upon a bill filed by the supposed lunatic, they were ordered to pay the costs of the suit, although it did not appear that they had acted from any corrupt motive, but were merely, as they considered, protecting the property for the benefit of those in remainder. (*o*) Indeed, it seems that, in general, although his motive may not have been corrupt, if a trustee, by his improper conduct, occasions a suit, the Court will fix him with the costs. (*p*) Thus if he refuses to act, from caprice or obstinacy, "it would be against the interests of society to hold that he should not be fixed with the costs occasioned by it." (*q*)

So, also, where the suit has been occasioned by a breach of trust, the trustees will be compelled to pay the costs; thus where trustees, with the privity of the wife, sold out stock which had been settled to her separate use, and paid the proceeds to the husband, taking his bond of indemnity, and the husband afterwards died insolvent, whereupon the trustees replaced the stock,—upon a bill filed by the widow and children to have the fund secured, the trustees were considered as having caused the suit by their breach of trust, and were ordered to pay the widow the amount of the dividends from the husband's death, with the costs of the suit. (*r*)

In like manner where a trustee, mistaking his power, sold stock without authority, and, with the produce, purchased land, without having the power to do so, he was ordered to replace the stock and to pay the costs. (*s*)

*And where the trustee of a legacy, which had been invested in [*53] stock, authorized another person, who was supposed to be entitled to the management of it, to sell it out and receive the produce, it was held that the trustee was answerable for the stock, and he was ordered to pay the costs, although the legatee, not knowing that the legacy had ever been invested or sold out, had dealt with the party who sold it out as the person accountable for the money. (*u*)

It seems, that, in order to constitute such misconduct as will induce the Court to visit trustees with costs, it is not necessary that there should have been *misfeasance* on the part of the trustee; simple *nonfeasance*, where it has been productive of mischief to the trust estate, will be sufficient; thus, where the

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(*k*) Crackelt v. Bethane, 1 Jac. & W. 386; *vide etiam* Mosley v Ward, 11 Ves. 581; Piety v. Stace, 4 Ves. 620: *vide* note (*f*), *ante*, p. 50.
(*l*) Franklin v. Frith, 3 Bro. C. C. 433. (*m*) Horsley v. Chaloner, 2 Ves. 83.
(*n*) Sheppard v. Smith, 2 Bro. P. C. 372.
(*o*) Brown v. How, Barnard. 354. (*p*) *Vide* Caffrey v. Darby, 6 Ves. 488.
(*q*) *Vide* Taylor v. Glanville, 3 Mad. 178; *vide etiam* Jones v. Lewis, 1 Cox. 199; *ante*, p. 39; Earl of Scarborough v. Parker, 1 Ves. J. 267.
(*r*) Whistler v. Newman, 4 Ves. 129. (*s*) Earl Powlet v. Herbert, 1 Ves. J. 297.
(*u*) Adams v. Clifton, 1 Russ. 297.

trustees of a charity, although they were not guilty of any corruption, had been extremely negligent in their trust, Lord Chancellor King held, that they ought to be punished with some of the costs. (*x*) So, also, where an executor omitted to bring an action to recover a bond debt, he was ordered to pay the costs of taking the accounts. (*y*)

And where two executors had kept money of their testator in their hands longer than the contingencies of the affairs required, and were consequently ordered to pay the amount with interest, but one was insolvent, the Court ordered each of them to be liable to whole costs. (*z*)

In a recent case, where, in consequence of disputes between trustees, as to who should receive the rents of the trust estate, the rents were suffered to get into arrear, and the *cestui que trust* was obliged to file a bill for a receiver, &c., the Master of the Rolls ordered that the costs of the suit should be paid by the trustees. It was, however, contended, on behalf of some of the trustees, that they were not to blame and that the fault lay with the others, and upon that, [*54] the Master of the Rolls offered to direct an inquiry, if it should be asked *for, as to the circumstances by which the plaintiff had been prevented from receiving her rents, in order that the Court might adjudicate between the defendants in respect of the costs; but the inquiry was declined.

In many cases, also, if there is misconduct on the part of a trustee or personal representative in the course of the cause, the Court will compel him to pay the costs of the suit out of his own pocket. Thus a trustee will be fixed with costs if he wilfully mis-state the accounts, (*a*) or if, by chicanery in his answer, he keeps the *cestui que trust* from a true knowledge of the accounts, or even if he has kept the accounts in a very confused manner. (*b*) An executor, also, will be liable to costs, if he deny assets and the contrary be proved against him, (*c*) though, where he was the executor of an executor, and the estates of the two testators had been so blended as to create confusion, he was excused his costs though it appeared he had assets sufficient to pay the plaintiff's debt. (*cc*) And wherever the answer of an executor or other trustee is falsified by proof, and he appears to have acted from fraudulent motives, he will be made to pay the costs. (*d*) So, also, if a corporation, being trustees for a charity, suppress or conceal evidence relating to the charity, they will be held liable to the costs of the suit. (*e*) And if a trustee, by his answer, set up objections to the performance of his trust, which he does not substantiate, he will be made to pay the costs. (*f*)

It is to be remarked, that, although a personal representative, or other trustee, who misconducts himself in his trust, will be liable to pay the costs of the suit, the rule will be qualified where, though the conduct has been irregular, no loss has been incurred to the estate, and his motive has not been corrupt; thus where [*55] a trustee had been guilty of a breach of *trust, by calling in the trust fund, and mixing it with his own money, yet, as no loss was incurred, and the trustee was free from all imputation of fraud, having always

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(*x*) East v. Ryal, 2 P. Wms. 284; *vide etiam* Haberdashers' Comp. v. The Atty. Gen., 2 Bro. P. C. 370; Atty. Gen. v. Hobert, Rep. t. Finch, 259.

(*y*) Lowson v. Copeland, 2 Bro. C. C. 156, Ed. Belt.

(*z*) Littlehales v. Gascoyne, 3 Bro. C. C. 73.

(*a*) Sheppard v. Smith, 2 Bro. P. C. 372, and *vide* Flannagan v. Nolan, 1 Moll. 86.

(*b*) Avery v. Osborne, Barnard. 349; Norbury v. Calbeck, 2 Moll. 461.

(*c*) Sandys v. Watson, 2 Atk. 80. (*cc*) Ibid.

(*d*) Vaughan v. Mursdon, Coller's P. C. 175; *vide etiam* Mallabar v. Mallabar, Ca. t. Talbot, 79.

(*e*) Borough of Hertford v. The Poor of Hertford, 2 Bro. P. C. 377; Atty. Gen. v. East Retford, 2 M. & K. 35.

(*f*) Willis v. Hiscox, 4 M. & C. 198; *sed vide* Low v. Carter, 1 Beavan, 426.

been ready to pay the money, Sir Anthony Hart, L. C., confirmed a decree by which the trustee was allowed to have his costs out of the fund. (*g*) The case will, however, be different, if any loss has been occasioned to the estate.

It has also been held, that a slight instance of misconduct, in one particular point, will not fix a trustee with the costs; thus where, by an order, made by consent several years before, a trustee had been ordered to pay £200 into Court, but had not done it, and, as an excuse for his disobedience, alleged that the plaintiffs did not serve him with the order, or take any step to have it executed, and that he understood they were dissatisfied with it, and intended to try to have it varied; the Court charged him with interest on the £200 "for the sake of the precedent; because, when an order is made by consent for a sum of money to be paid into Court, no man can dispense with it—either upon the tacit acquiescence of the other side or upon an idea of his own," but, because this was misconduct in a single article of small value, and the Court had fixed a mark of sufficient reprobation upon that single article, it was of opinion that this was not a case to deprive the defendant of his costs, and that he was within the common case of a trustee who is entitled to his costs, to be retained out of the money in his hands. (*h*)

In *Hall* v. *Hallet*, (*i*) Lord Thurlow said that the rule, that executors are to be exempt from paying costs, holds "even in cases where great delays and difficulties have been occasioned by the executor, for the Court will overlook these circumstances if it can." And it is to be observed, that, although an executor or other trustee who grossly misconducts himself in the execution of his trust, will be made to pay the costs occasioned by his misconduct, it does not therefore follow that he must, in all cases, pay the costs of the whole suit. "If a suit would have been proper and the executor or trustee a neces- [*56] sary party, though he had not misconducted himself, he will not be compelled to pay all the costs of such suit, though in the course of the suit it should appear that he has misconducted himself. Thus, where a suit was necessary to determine what construction was to be given to a will,—whether the residue was to be divided between nine or between six claimants, and, in the course of the suit, it appeared that the executors had improperly permitted rents to be in arrear, and retained balances in their hands, as to which inquiries were directed, and they were charged with interest, the Master of the Rolls gave the executors the costs of the suit out of the fund, except only the costs of the inquiries as to the arrears of rent and balances, which, being solely occasioned by their breach of trust, he directed to fall upon them. (*k*) So where trustees for sale purchased the trust estate at an undervalue, though without fraud and by auction, relief, as to a re-sale, was given against them with costs, but as to other parts of the case, *i. e.*, as to accounts which must have been taken, they were allowed their costs, as they would have been entitled to them in the ordinary way. (*l*)

In such cases the Court, frequently, instead of giving any direction with regard to costs, will content itself with making no order upon the subject, thereby leaving it to each party to pay his own costs, (*m*) thus where a trustee, instead of accumulating a fund, as directed by the will, had improperly kept the balance in his hands, yet, as the costs of the suit had in a great measure been occasioned by inquiring what rule the Court ought to adopt with respect

(*g*) *Vide* Caffrey v. Darby, 6 Ves. 488.
(*h*) Sammes v. Rickman, 2 Ves. J. 36; *vide etiam* Fitzgerald v. Pringle, 2 Moll. 534.
(*i*) 1 Cox. 134, 141; *vide etiam* Bennett v. Attkins, 1 Y. & C. 247.
(*k*) Tebbs v. Carpenter, 1 Mad. 296.
(*l*) Sanderson v. Walker, 13 Ves. 601; *vide etiam* Pocock v. Reddington, 5 Ves. 800.
(*m*) Newton v. Bennett, 1 Bro. C. C. 362.

to the computation of interest, it was thought hard, under the circumstances, to fix the executor with costs, even relatively to the breach of trust, and, therefore, the Court gave no costs. (*n*)

If a suit has been occasioned by the mistake or some slight neglect of the trustee, the Court will content itself with not giving him costs; (*o*) and, in some cases, where the conduct *of trustees has not been wilful or perverse, the Court has permitted them to have them, although there has been loss to the estate; (*p*) thus, where trustees, who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, £6000 for the estate and afterwards sold it for £3600, the Court, although it charged them with the loss, gave them their costs, as their conduct had not been wilful nor perverse. (*q*)

[*57]

When it is said that personal representatives and others bearing the character of trustees, are entitled to their costs out of the fund or estate which is the subject of the suit, the rule must be understood as applying strictly between themselves and their *cestui que trusts;* in suits between them and those who are strangers to the trust, the ordinary rule that *victus victori in expensis condemnatus est* prevails, (*r*) though if a trustee or personal representative institutes or defends a suit in respect of his trust estate, he may reimburse himself, out of that estate, any sums he may have expended properly in such suit.

Thus, where a trustee for sale, filed a bill for a specific performance, which was dismissed, it was dismissed with costs, the defendant being considered as having nothing to do with the character in which the plaintiff sued. (*s*)

Costs also are given against assignees personally, and not *quâ assignees;* they are to pay them, and then may be allowed to draw them out of the estate; but the opposite party is not to be exposed to the hazard, whether the estate is capable of bearing the costs or not; if it be not, it is the misfortune of the assignees. (*t*)

*So also, an executor plaintiff cannot be distinguished, with respect to costs, from the party whom he represents; (*u*) and if he revive a suit in which his testator was a party, he will incur his testator's liability to costs. Thus, where an executor, after a bill by his testator had been dismissed with costs, revived the suit, alleging that he intended to appeal, he was ordered to pay the costs of the whole suit. (*x*)

[*58]

Upon the same principle, it is the practice of the Court, when a bill is filed against an executor or administrator, by a creditor of the deceased, and the creditor succeeds in establishing his demand, to direct the payment of the amount due to the creditor, together with his costs, out of the assets; (*y*) but it makes

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(*n*) Raphael v. Boehm. 13 Ves. 592. (*o*) O'Callaghan v. Cooper, 5 Ves. 117.

(*p*) Taylor v. Tabrum, 6 Sim. 281; and *vide* Flanagan v. Nolan, 1 Moll. 84.

(*q*) Travers v. Townsend, ib. 496. (*r*) *Ante*, p. 6.

(*s*) Edwards v. Harvey, Cooper, 40.

(*t*) Poole v. Franks, 1 Moll. 78. Where assignees are made parties to a suit, it is not usual, nor necessary, to direct their costs out of the bankrupt's estate; for they may charge them in their accounts, unless there are any special reasons to the contrary; for this would be to charge an estate which is not adversely represented before the Court. In bankruptcy costs are given out of the estate, because there the Court has jurisdiction over it. Ryan v. Anderson, V. C., May, 1819; 2 Mad. Prin. & Prac. Ed. 1837, p. 741.

(*u*) Westley v. Williamson, 2 Moll. 458.

(*x*) Horlock v. Priestly, 8 Sim. 621; Lyon v. M'Kenna, 2 Moll. 460.

(*y*) Courts of Law, in giving judgment in favour of a creditor, direct the costs to be paid by the executor, *de bonis testatoris*, and if there be none, *de bonis propriis;* in equity,

no order with regard to the payment of the costs of the personal representative. In omitting this, the Court proceeds upon the supposition that the representative may reimburse himself any charges or expenses he may have been at, in the account of the testator's or intestate's estate, which is always kept by executors or administrators; so that if there be no further fund out of which he may reimburse himself, the costs will of course come out of his own pocket; (*z*) and even if it should appear, from the Master's report in the cause, that the assets are already exhausted, and that there is no fund out of which the personal representative may reimburse himself, still the Court will not give any directions with regard to his costs, "for there may be more assets than appear by the Master's report, for the *plaintiffs might content themselves to prove sufficient to answer their demands;" (*a*) besides which, it is stated to [*59] be a settled rule, "that the executors of an insolvent shall not have their costs, as they need not have administered." (*b*) And it is to be observed, that even though a specialty creditor should sweep away the whole personal estate, this Court will not let the executor reimburse himself his costs, out of the real estate of the debtor. (*c*)

So, where a bill was filed for the purpose of raising legacies charged on real estate, there being no personal estate, it was held, that the executor taking out probate in such a case, could get no costs; (*d*) the rule is the same in the case of the executor of an insolvent mortgagor. (*e*) The case is, however, different with respect to an administrator *ad litem*, who will be entitled to his costs out of the fund, (*f*) or if that is deficient, from the plaintiff, as in the instance of a provisional assignee or guardian *ad litem*. (*g*)

If an executor, who has neither proved nor acted, although he has not renounced, is made a party to a suit, for the purpose of raising charges by the sale of real estate, the personal estate being insufficient, the costs of such executor cannot be paid out of the fund, but must be borne by the plaintiff, as he was not a necessary party. (*h*)

The rule, which has been laid down above, (*i*) that in suits by a creditor against a personal representative, the Court makes no order with regard to the payment of the representative's costs, proceeds, as has been stated, upon the principle, that the personal representative may reimburse himself those costs out of the personal estate, and applies only to suits by individual [*60] creditors *for their own demands. Where the suit is instituted either by creditors or by legatees, for a general administration of assets, so that the whole estate of the deceased must necessarily come under the direction of the Court, the practice is different, and the costs of the personal representatives

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however, the rule is different, for if the assets be not sufficient to pay both debt and costs, the executor will not be decreed to *pay* costs, (Uvedale v. Uvedale, 3 Atk. 119; Twisleton v. Thelwel, Hardr. 165;) unless he has misconducted himself, by having satisfied simple contracts in preference to debts upon specialty, *vide* Jefferies v. Harrison, 1 Atk. 468. It may be suggested here, that, as an admission of assets by a representative, is considered to be an admission of assets sufficient to pay costs as well as the principal demand, (Philanthropic Society v. Hobson, 2 M. & K. 357,) such admission should not be made, unless the party is satisfied that the assets will cover debt and costs.

(*z*) Humphrys v. Moore, 2 Atk. 108.
(*a*) *Vide* Davy v. Seys, Mos. 204.
(*b*) *Per* Lord Redesdale, in Adair v. Shaw, 1 Sch. & Lef. 280.
(*c*) Uvedale v. Uvedale, 3 Atk. 117. In this respect, there is a material difference between an heir-at-law and personal representatives, because they may renounce, "but it is the law which casts the descent upon the heir;" the heir, therefore, will be entitled to his costs out of the fund raised by sale of the estate, although such fund may not be sufficient to discharge the whole of the claims upon it; Humphrey v. Morse, 2 Atk. 408.
(*d*) Nash v. Dillon, 1 Moll. 236.
(*e*) Nicholson v. Falkiner, ibid. 555.
(*f*) Ibid.
(*g*) *Ante*, p. 8.
(*h*) Nicholson v. Falkiner, *ubi supra*.
(*i*) *Ante*, p. 52.

are always provided for; and even where there is a deficiency of assets, to pay the whole of the testator's debts, they constitute the first charge upon the fund arising from the personal estate. (*k*) The right of the personal representative to his costs, in such cases, may be defeated by his collusion, or by some of those circumstances which have been already pointed out, as disentitling a trustee from his right to the costs out of the fund; but where there are no circumstances of that nature, the costs of the personal representative constitute the primary charge.

It may be noticed, in this place, that it appears to have been considered, formerly, that a creditor filing a bill, was not entitled to have his costs out of the fund, unless there was enough to pay prior demands upon the estate; but now the practice is, when a suit has been fairly instituted for the administration of assets, that the first payment, after the payment of the costs of the executor who has not disentitled himself to costs, should be the costs incurred by the plaintiff in the suit. (*l*) This is stated, by Sir Anthony Hart, L. C., (*m*) to have been the rule of the Court of Chancery in England, for at least thirty years; but it appears to have been shaken by the determination of Sir J. Leach, M. R., in *Young* v. *Everest*, (*n*) and *Rowlands* v. *Tucker*, (*o*) who held, that where a simple contract creditor filed a bill, and it appeared that there was a specialty creditor, whose demand would exhaust the whole of the assets, the executor might have his costs out of the assets, but not the plaintiff. (*p*) In a more recent case, however, Lord Cottenham, when Master of the Rolls, disapproved of this departure from the ancient rule, and said, "it was [*61] contrary *to reason, and the uniform practice of this Court, that specialty creditors, who came in to take the benefit of a suit instituted by a simple contract creditor, should throw the burthen of the costs of the suit upon the simple contract creditor, where the assets proved insufficient for the full satisfaction of their claims, and accordingly directed the plaintiffs to be paid their costs out of the fund. In a subsequent case, (*q*) his Lordship adhered to the rule he had laid down in *Larkins* v. *Paxton*, (*r*) and the rule formerly laid down by Sir J. Leach, in *Loomes* v. *Stotherd*, (*s*) that the costs of the suit are to be considered as expenses of administering the estate, and are the first charge upon the estate, whether administered in or out of Court, is now generally acted upon. (*ss*)

But although it is the general rule, that, after the payment of the executor's costs, the plaintiff's costs, in a creditor's suit, are to be the first payment out of the fund brought in, such rule is not invariable; and if a *puisne* creditor files a bill on the foot of a debt, which, from the state of the fund, he might have known was probably desperate, the Court will, in all probability, refuse such a plaintiff his costs in the cause; (*t*) and where it appeared, upon the Master's report, that there was no fund at all applicable to the payment of the general

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(*k*) Bennett v. Going, 1 Moll. 529; Young v. Everest, 1 R. & M. 426.
(*l*) Bennett v Going, *ubi supra.* (*m*) Ibid.
(*n*) 1 R. & M. 426. (*o*) Ibid. 635.
(*p*) Larkins v. Paxton, 2 M. & K. 320.
(*q*) Barker v. Wardle, ib. 818; *vide etiam* Lechmere v. Brazier, 1 Russell, 80. It is upon the ground, viz: that the fund brought into Court, is thus applied in payment of the plaintiff's costs, that the direction in the decree, that all persons coming in under it are to contribute to the expenses, has not of late years been acted upon, as the plaintiffs thereby receive the contribution which they might claim under the decree; ibid. and *vide ante*, vol. 2, p. 863.
(*r*) In such cases, the plaintiffs will be entitled to their costs, as between solicitor and client, *vide* Tootal v. Spicer, 4 Sim. 510; *vide etiam* sect. IV. of the present chapter.
(*s*) 1 S. & S. 458, 460. (*ss*) *Vide* Hare v. Rose, 2 Ves. 558.
(*t*) Egan v. Baldwin, 1 Moll. 539.

creditors, the plaintiffs were ordered to pay the costs, except the costs of certain defendants, who, having specific liens upon the only fund brought into Court in the suit, had wholly exhausted that fund. (*u*)

It is to be remarked, however, that, in the last-mentioned case, the executor had, by his answer, stated the insolvency of *the testator, and that his answer was confirmed by the finding of the Master; but in [*62] *Robinson* v. *Elliott*, (*x*) the executrix, although she had represented that her testator was insolvent, which was true, yet, as she was charged with more than she had admitted by her answer, the bill, as against her, was dismissed without costs.

It may be observed, in this place, that in suits by *puisne* incumbrancers or general creditors, for the administration of assets, it is not usual to make persons having prior specific charges, parties to the suit, as they will be untouched by a decree for sale, (*y*) and may therefore, if they are made parties, insist upon having the bill, as against them, dismissed with costs. They may, however, waive that right, and consent to a sale, and to receive payment of their principal and interest out of the proceeds; in which case, although the decree is for the payment of all parties, according to their priorities, that is to be understood only as to their principal and interest; they must all contribute to the costs of suit, of which they take the advantage, consequently the costs of all parties must, in the first instance, come out of the fund. (*z*)

The Court acted upon this principle, in *Kenebel* v. *Scrafton*, (*a*) where, in a suit instituted by a first mortgagee, instead of a foreclosure, a sale was directed with the consent of the second and third mortgagees, and the produce not being sufficient to pay them all, the costs were ordered to be paid, in the first instance, out of the fund, although it was objected to by the third mortgagee, whose fund would thereby be proportionably diminished.

It is to be remarked, that although a creditor, who files a bill for an administration of assets, will be entitled to his costs out of the fund in Court, such title will not affect the personal representative's right of retainer for satisfaction of a debt due to himself; and even where part of the personal estate had been paid into Court by an administrator, *and another part of it remained in [*63] his hands, but there was a debt due to him from the intestate, greater than the amount of both funds, and no other assets to satisfy the general body of creditors, or even to pay the costs of the plaintiff,—the Master of the Rolls, Sir J. Leach, was of opinion, that the administrator's right of retainer was not affected by the circumstance of his having paid the money into Court, and that the plaintiff was not entitled to have his costs satisfied out of the fund, to which the right of retainer extended. (*c*) But although a personal representative may retain for the amount of his own debt, in preference to the claim of the plaintiff for the costs of the suit, the same thing cannot be done by a devisee of real estates, which are subject to the payment of debts. This rule is laid down in *Loomes* v. *Stotherd*, (*d*) by Sir J. Leach, V. C., who says, "an executor may retain for his own debt, or the debt of his trustee, and therefore a devisee may retain for his own specialty debt, or the debt of his trustee; and if the devisee is also the executor of a deceased creditor, he may retain for his own debt, and next for that of his testator; but the devisee cannot retain his debt in priority to the costs of the suit; because the costs of the suit are to be

(*u*) Bluett v. Jessop, Jac. 240.
(*x*) 1 Russ. 599.
(*y*) *Ante*, vol. 1, p. 6.
(*z*) Brace v. the Duchess of Marlborough, Mos. 50; White v. the Bishop of Peterborough, Jac. 402; Egan v. Baldwin, 1 Moll. 539.
(*a*) 13 Ves. 370.
(*c*) Chissum v. Dewes, 5 Russ. 29.
(*d*) 1 S. & S. 458.

considered as expenses in administering the estate, and are the first charge upon an estate, whether administered in or out of Court." If, however, a devisee states in his answer, that his right of retainer will exceed the assets, after such notice, the plaintiff may be considered as proceeding at the peril of costs. (*e*)

The above rules apply to cases where there is a deficiency in the fund realized by the suit to answer all the claims upon it, but, where the fund is not in that predicament, the general rule is, that, wherever it is necessary to come to the Court, to establish a demand upon the property of persons deceased, the costs of such proceedings must be borne out of the assets. (*f*) Therefore, if a bill [*64] be filed by a creditor *for his debt, or by a legatee for his legacy, the costs of the suit must be paid out of the testator's estate; so, also, must the costs of a suit, to obtain the benefit of a *donatio mortis causâ*. The expenses of a suit, also, by residuary legatees, or next of kin, for an account and distribution of an estate, must be defrayed out of the general estate. And it seems that, in such suits, the circumstance that the defendant has offered to the plaintiff a full inspection of his account, makes no difference; a plaintiff, in such a case, is not bound to receive and acquiesce in the mere unsupported statement of the accounting party, he has a right to have the account of the estate taken with the sanction of oaths, and all other guards against deception, which a Court of Equity can supply. (*g*) And it appears that the circumstance, that the plaintiff himself, besides being a residuary legatee, is a co-executor with the defendants, will not make any difference in the application of the rule; though, if he files his bill in the character of creditor as well as legatee, and fails in establishing his claim as creditor, he will have to bear any additional costs which may have been occasioned by his unfounded claims. (*h*)

Where a bill is brought to secure and have the benefit of a contingent interest devised over, the costs must be paid out of the general assets of the testator, who by his will occasioned the difficulty; (*i*) and it is invariably held, that if in the course of a suit for the administration of an estate, a difficulty arises upon the construction of the will, the costs occasioned by such difficulty, must be [*65] defrayed out of the assets, (*k*) even though the *difficulty has arisen from parol evidence, introduced on the part of the defendant. (*l*) When, however, it is said, that a legatee, filing a bill for his legacy, will be entitled to his costs out of the estate, it must be understood only, as applying to those cases in which he is successful in the suit. If a person claims as legatee, and his bill is dismissed, he will not be entitled to his costs out of the testator's estate, notwithstanding there is an ambiguity in the will, which renders it necessary to apply to the Court for its construction. (*m*) In such cases, how-

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(*e*) Ibid.

(*f*) *Vide* Hampson v. Brandwood, 1 Mad. 381, 394; Gardner v. Parker, 3 Mad. 184.

(*g*) Sharples v. Sharples, M'Lel. 506; 13 Pri. 745, S. C.

(*h*) Ibid. (*i*) Studholme v. Hodgson, 3 P. Wms. 300.

(*k*) This rule applies only to cases arising under wills; it does not apply where difficulties arise upon the construction of deeds, in which cases, although if the deed which gives rise to the suit be so darkly framed as to occasion fair doubts as to its construction, the Court will excuse the unsuccessful parties their costs; it will not compel the successful party to pay them out of the estate; Hampson v. Brandwood, *ubi supra; vide etiam* the Earl of Oxford v. Churchill, 3 V. & B. 59, where the costs of an unsuccessful claim, set up on behalf of an infant to a share of a fund under a settlement, was charged, not upon the general fund, but upon that portion of the fund to which the infant was held to be entitled.

(*l*) Nourse v. Finch, 1 Ves. J. 362.

(*m*) Lister v. Sheringham, cited 1 Newl. Pra. 397. In Wyndham v. Graham, where the bill was dismissed, Sir J. Copley, M. R., acting on the authority of Lynn v. Beaver, Turn. & R. 68, directed the costs of all parties to be paid out of the fund; he does not appear, however, to have adverted to the distinction that, in Lynn v. Beaver, there was no

ever, the Court will, if the case involves considerable difficulties, occasioned by conflicting decisions and the acts of the testator, make each party bear his own costs, by ordering the dismissal to be without costs; (*n*) so it will, also, where the plaintiff has a fair ground for making his claim. Therefore, where a bill was filed, by the next of kin of a testator, against the executors for the residue, and the next of kin failed, the bill was dismissed without costs, because, "when the next of kin are disappointed of the residue, it is some excuse for their litigating the executor's right to it." (*o*) And where, after a verdict upon an issue, finding against the legitimacy of a person claiming a legacy as a legitimate child, a question arose as to the costs, the Court refused to give costs against him, as he had always borne the name of the family, and been received in it. (*p*)

It may be noticed here, that in a case where a bill was filed for a legacy, which had been bequeathed to an infant, and which had been more than satisfied by advances made for the infant's benefit, during his minority, and by a larger legacy bequeathed to the infant by the executor, the Court decreed in favour of the legatee, though there had been no demand for *ten years after he came of age; but as it considered the demand very ungracious, it gave the legatee no costs. (*q*) [*66]

This, however, can only be considered as an exception to the general rule adopted by the Court, that a legatee filing his bill to recover payment of his legacy, is entitled, if he succeeds, to his costs out of the estate. And here it may be remarked, that if a legatee comes in before the Master under a decree for the administration of assets, and establishes his claim, he will not be deprived of his costs out of the estate. In *Maxwell* v. *Wettenhall*, (*r*) the same rule was applied to a creditor coming in to prove under such a decree, but, as we have seen, except under particular circumstances, this is not now the practice. (*s*)

Where, however, a legatee, who agreed, after a decree for the administration of an estate in Chancery obtained by another legatee in Chancery, to stop proceedings in a suit previously instituted by him in the Exchequer, he was allowed the costs of his suit in the Exchequer, up to the time of his having notice of the decree in Chancery. (*t*)

It is necessary, here, to advert to an important distinction with regard to the portion of the testator's estate out of which the costs are to paid, for the rule is, that where a legacy, either general or specific, is to be paid out of the testator's estate, and any doubt or ambiguity arises under the will, which renders an application to the Court necessary, the costs occasioned by such application are to be paid, not out of the legacy or bequest with respect to which the doubt arises, but out of the general assets not otherwise disposed of; (*u*) in other words, they are payable out of, what is usually termed, the residuary estate, although, perhaps, the term may not be quite correct, inasmuch as the residuary

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actual dismissal, but a declaration of the rights of the parties was made by the decree; besides which, it is to be remarked that, in the decree itself, the order as to costs is expressly stated to have been made by consent. Ibid. 70.

(*n*) Cogan v. Stephens, Lewin on Trustees, Appx. 2, p. 698.
(*o*) Brasbridge v. Woodroffe, 2 Atk. 69.
(*p*) Forbes v. Taylor, 1 Ves. J. 99.
(*q*) Lee v. Brown, 4 Ves. 362.
(*r*) 2 P. Wms. 26.
(*s*) *Vide ante*, vol. 2, p. 868.
(*t*) Jackson v. Leaf, 1 Jac. & W. 229.
(*u*) Studholme v. Hodgson, 3 P. Wms. 303; Jolliffe v. East, 3 Bro. C. C. 27; Baugh v. Reed, ib. 195; 1 Ves. J. 257, S. C.; Atty. Gen. v. Hurst, 2 Cox, 365; 3 Bro. C. C. 380, S. C.; sub nom. Atty. Gen. v. Winchelsea, Barrington v. Tristram, 6 Ves. 249; Pearson v. Pearson, 1 Sch. & Lef. 12; Bagshaw v. Newton, 9 Mod. 288; Nisbett v. Murray, 5 Ves. 158, *cum multis aliis*.

[*67] estate is, strictly speaking, that *part of the estate which remains after payment of all legal and testamentary claims upon the estate, whether for debts, legacies, or costs. (x)

This residuary estate is the general fund for paying all the costs incurred in the course of administering the estate, and is applicable before the particular fund which has occasioned the litigation, which can only be applied in the event of the general or residuary estate proving deficient. Thus, where it was necessary to have the decision of the Court, as to whether a legacy of £10,000, given to two sisters, was a joint bequest or in common, the costs were ordered to be paid, not out of the legacy, but out of the general assets. (y) So, where a bill was brought to secure and have the benefit of a contingent interest devised over, the costs were ordered to be paid out of the residuary estate; and where the question, whether a legacy is specific or not, the costs of determining that question have been ordered out of the general estate, in preference to the specific legacy, although the general estate was made the subject of a residuary bequest. (z) Upon the same ground, it was formerly held, that by giving a legacy to an infant, the testator made it necessary to come into this Court for directions how to lay it out; and that, therefore, the costs of a bill by an infant legatee, to have the legacy secured for his benefit, must be paid out of the residue. (a) Such applications have, however, been rendered unnecessary, by the 36 G. 3, c. 52, s. 32, which, in the case of an infant, authorizes the executor to pay the legacy into Court; and in *Whopham* v. *Wingfield*, the Court said that, in future, the costs would not be given in such a case. (b)

The rule which throws upon the general assets the costs of litigation, as to any particular fund, will even apply in cases where the testator has directed his *testamentary expenses* to be paid out of the particular fund, the meaning of the [*68] words *testamentary expenses*, being confined to the usual charges of *probate, &c.: (c) it will also apply, where the difficulty has arisen, not upon a bequest of personal estate, but upon a devise of real estate: thus, where a testatrix devised a real estate, subject to the payment of a corn-rent for a charitable purpose, to one *Christopher Wilson*, and it appeared, by the Master's report, that the name of the person to whom the testatrix intended to give the estate was *James*, instead of *Christopher*, the Master of the Rolls, Lord Langdale, directed the expenses of the inquiry as to the identity of James Wilson, as well as the costs of making the Attorney General a party, for the purpose of having the charge of the corn-rent declared void under the Mortmain Act, to be paid out of the personal assets, as the inquiry was rendered necessary by the mistake of the testatrix; and a residuary legatee is only entitled to the residue of the personal estate, after payment of all the costs and charges occasioned by the will. (d)

It is to be observed, here, that in the application of this rule, no distinction exists between cases in which the residue is disposed of, and where it is not; (e) and that where there are specific bequests and pecuniary legacies, which exhaust the whole estate so that there is no residue, the costs occasioned by the specific bequests, will be thrown upon the general fund, out of which the pecuniary legacies are payable. (f) Thus, in *Barton* v. *Cooke*, (g) where there were

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(x) Eyre v. Marsden, 4 M. & C. 231—243; Ripley v. Moysey, 1 Keen, 578.
(y) Jolliffe, v. East, 3 Bro. C. C. 25. (z) Nisbett v. Murray, 5 Ves. 158.
(a) Anon. Mos. 5; Whopham v. Wingfield, 4 Ves. 630.
(b) *Ubi supra, ante*, vol. 1, p. 112. (c) Browne v. Groombridge, 4 Mad. 495.
(d) Ripley v. Moysey, 1 Keen, 579.
(e) Eyre v. Marsden, 4 M. & C. 244; Nisbett v. Murray, 5 Ves. 149; Howse v. Chapman, 4 Ves. 542.
(f) Ibid. (g) 5 Ves. 461.

specific and pecuniary legacies, and the personal estate, after setting apart the specific legacies, was not sufficient to pay all the pecuniary legacies, so that an abatement amongst them became necessary, the costs were ordered to be paid out of the personal estate not specifically bequeathed. The rule will also prevail where property intended to be disposed of, has, in the result, been declared undisposed of; there the costs will not be thrown upon the property so declared to be undisposed of, but, as in other cases, upon the general estate: thus, in *Howse* v. *Chapman*, (*h*) where some of the bequests, in favour of the city of Bath, *which were specific, were held to be void under the Statute [*69] of Mortmain, the costs were ordered, in the first instance, to be paid out of the residue undisposed of, that is, out of the property not specifically given, before any part of the property given to the city of Bath; but, in case of a deficiency, the remainder of the costs were to be defrayed out of the property given to the city of Bath, to which the property well given and the property intended to be given, but which had been held to be undisposed of, were to contribute *pro rata*.

So where a legacy given by a will, has lapsed by the death of the legatee in the lifetime of the testator, the costs will be paid out of the general fund, and not out of the lapsed legacy; (*i*) and the same rule applies where the intestacy, as to part, does not arise from lapse, but from revocation of a bequest, as in *Cresswell* v. *Cheslyn*, (*k*) as explained in the note to *Skrymsher* v. *Northcote*; (*l*) and in the latter case itself, in which the question was raised, that the costs of the suit ought to be paid out of the part undisposed of, and not out of the general estate, but Sir Thomas Plumer decided that the costs should be apportioned. (*m*)

And it makes no difference, whether the property undisposed of, (whether from lapse or from any other cause,) was given as a specific or pecuniary bequest, or a share of the residue; in either case, the costs of the suit will not fall on the undisposed-of share, but on all the shares; thus in *Ackroyd* v. *Smithson*, (*n*) the costs were paid *pro rata*, out of the shares of the residue which the legatees took, and those shares which had lapsed; and, in cases where part of the property given to a charity becomes undisposed of, from being within the Mortmain Act, it has been long settled, that the costs are paid *pro rata*, out of the property so undisposed of, and the property well bequeathed to the charity. (*o*)

*The cases above referred to, establish the principle that, where [*70] an intestacy as to part of the personal estate, arises from the intention of the testator being defeated by the happening of some event, or by the operation of the law, the part thus falling to the next of kin, shall in his hands be subject to the same liability as to costs, *and no more*, that it would have been subject to, if the gift had taken effect; and the principle has been extended to cases where accumulations directed by a will have been declared absolutely null and void under the Thellusson Act, (39 and 40 Geo. 3, c. 98.) Thus, in *Eyre* v. *Marsden*, (*p*) where the Master of the Rolls having declared, that a direction for the accumulation of the produce of the testator's freehold and personal estate was void under the above act, and that such parts of the accumula-

(*h*) 4 Ves. 542.
(*i*) Roberts v. Walker, 1 Russ. & M. 752.
(*k*) 2 Eden. 123.
(*l*) 1 Swans. 571.
(*m*) *Vide* Eyre v. Marsden, 4 M. & C. 245.
(*n*) 1 Bro. C. C. 503. The printed report, however, is silent as to costs; but the duration as to costs is shewn by the Registrar's book, *vide* 4 M. & C. 245.
(*o*) *Per* Lord Cottenham, C., in Eyre v. Marsden, 4 M. & C. 245; and *vide* Atty. Gen. v. Lord Winchelsea, 3 Bro. C. C. 573; Atty. Gen. v. Hurst, 2 Cox, 364; and Howse v. Chapman, *ubi supra*.
(*p*) *Ubi supra, et vide* 2 Keen, 564, S. C.

tion as arose from the real estate, belonged to the heir, directed the costs of the suit to be paid *pro rata*, by the heir and personal representatives, out of the accumulations devolving upon them; but Lord Cottenham, upon appeal, varied the decree, by directing the costs to be paid out of the general estate of the testator.

But although the rule is, that the costs of a litigation, in the course of administering a will, are given out of the general assets, in preference to the particular fund, yet this rule prevails, only, where the question arises between an individual and the executor, or persons taking the bulk of the estate; if there is no question between them, and the question is merely between the persons interested in the particular fund, when separated from the residue, the costs must come out of the particular fund. (*o*)

It is, however, only where the legacy has been separated from the general fund, that the costs of ascertaining who is entitled to it will be paid out of the legacy itself: but it is the ordinary course of the Court, where there is some legacy clearly payable, but it is uncertain who is entitled to it, to order the legacy to be paid into the bank, with liberty for any person interested in it to apply, and to proceed to a distribution of the residue of the testator's estate; [*71] in such *case, any costs which may afterwards be incurred, in inquiring who is entitled to such legacy, must come out of the particular fund, for the Court will never postpone the distribution of the residue to answer the costs of such inquiry. Where, however, it is not clear that there is any legacy payable, and, before that point is decided, it is necessary that there should be a previous inquiry as to who is entitled in the event of its being payable, the legacy cannot be transferred into the name of the Accountant General, till the cause comes on for further directions, and in such case the costs will be payable out of the general estate. This appears to have been the rule adopted in *Wallis* v. *Williams*, (*p*) in which case the legacy was given to "such person of a particular name as should, within a certain time, prove to the executors that he or she was of the eldest line and nearest relation of the testator;" and a question arose, whether the person who had succeeded in making out his claim, should have the costs of the inquiry before the Master, out of the general assets, and it was decided that he should have all his costs out of the assets, except those of making out his pedigree. (*q*)

In another case, the question was, whether certain legacies were specific or not; and, in the course of such suit, inquiries had been directed as to the appointment of a guardian and maintenance for a specific legatee, who was an infant: the costs of the suit, except as to the inquiries with respect to the guardian and maintenance, were ordered out of the general assets, and the costs as to the guardian and maintenance were directed to be paid by sale of a sufficient part of the specific legacy. (*r*) So, also, the costs of the Governor and Company of the Bank of England, who are made parties for the security of a legacy, the right to which is under discussion, their costs will be paid out of the legacy; (*s*) and if the plaintiffs in a suit relating to the construction of a will, unnecessarily mix up other questions with the questions arising under the will of the testator, the costs of such part of the suit only as relate to the construction of the will, [*72] will be paid out of the general *assets. Thus, where a doubt arose under a will, whether a legacy given by the testator was undisposed of, and a suit was instituted by the residuary legatees of one of the next of kin of the testator, instead of his personal representative, in the course of which questions arose between them, the costs of so much only of the suit, as related

(*o*) Jenour v. Jenour, 10 Ves. 562; *vide etiam* Shaw v. Pickthall, Dan. Exc. Rep. 92; Duke of Manchester v. Bonham, 3 Ves. 61; King v. Tayler, 5 Ves. 809.

(*p*) Beames on Costs, Appx. 1.

(*q*) Beames on Costs, ed. 1840, p. 8.

(*r*) Barton v. Cooke, 5 Ves. 464.

(*s*) Hammond v. Neame, 1 Mad. 38.

to the decision upon the will, were ordered to be paid out of the general assets of the original testator. (*t*)

It may be remarked that, where a party entitled either to a legacy or share of a residue, encumbers his legacy or share, or by any act of his own occasions additional expense in respect of it, beyond what is necessary for the due administration of the estate, the additional expense will be thrown upon the particular fund or portion: thus, where a plaintiff in a suit for a share of a residue, by assigning his interest and taking advantage of the Insolvent Act, had rendered two supplemental bills necessary, the additional costs were thrown on his individual share, as costs occasioned by his own act. (*u*) And it may be stated, as a general rule, that where a fund is to be divided between several parties, and one or more of them, by charging their shares with mortgages, annuities, or other incumbrances, have contributed to swell the expense of the suit, the practice is to divide the fund in the first place, and direct the Master to calculate the costs of the suit with reference to each share, in which mode of doing it each party bears his own costs most equally. (*x*)

The course acted upon in *Bassevi* v. *Serra*, of apportioning the costs amongst the different parties interested, so as to throw the costs of each party upon his own fund, has been adopted in many other cases where different funds have been the subject of distribution or of discussion in the same suit. Thus, in *Leacroft* v. *Maynard*, (*y*) where the testator charged his legacies upon his real estate, and then bequeathed a legacy to a charity, the amount of which he altered by his *codicil, whereupon a bill was filed for the general administration of the testator's estates, and another bill was also unnecessarily filed by the heir-at-law to have the legacy bequeathed to the charity declared void under the Statute of Mortmain, and to have the real estate conveyed to him discharged of it; the Court directed that the costs of the suits, so far as related to the personal estate, should come out of the personal estate, and that the costs which related to the real estate should be borne by the real estate, so that the costs of the bill, so unnecessarily filed by the heir, should fall upon the real estate. Similar decrees for an apportionment of costs between real and personal estates, appear to have been made in *Jones* v. *Mitchell*, (*z*) and *Dixon* v. *Dawson*. (*a*)

[*73]

In *King* v. *Taylor*, (*b*) where the question was whether a legacy of stock and a share of the residue under a will went to the husband of a married woman who was dead, or to her brother, and the Court decided that the legacy went to the husband, and the share of the residue to the brother, the costs were ordered to be borne by each fund in moieties.

It may be mentioned, in this place, that where a *cestui que trust*, having a life interest only, is declared entitled to his costs out of the trust estate, the Court will not content itself with merely giving him a *lien* upon the corpus of the estate by the decree, leaving him to enforce it by subsequent proceedings, but it will direct an immediate sale of a sufficient part of the estate to raise the costs; and it appears that the omission of such a provision in the decree may be the subject of a re-hearing. (*c*)

(*t*) Skrymsher v. Northcote, 1 Swanst. 566. (*u*) Brace v. Ormond, 2 Jac. W. 435.

(*x*) Bassevi v. Serra, 3 Mer. 674; 14 Ves. 313, S. C.; *vide etiam* Mocatta v. Lousada, cited ibid.

(*y*) 1 Ves. J. 279; 3 Bro. C. C. 233. (*z*) 1 S. & S. 290.

(*a*) 2 S. & S. 327; *vide etiam* 1 Bro. C. C. ed. Belt, 265 n. 3, and Walter v. Maunde, 19 Ves. 424. (*b*) 5 Ves. 806.

(*c*) Burkett v. Spray, 1 R. & M. 113. It seems, however, that, in such a case, the party entitled to the costs, instead of appealing, may apply by motion to have them raised by sale; *vide* Cannell v. Beeby, Beames on Costs, ed. 1840, Appx. No. 7.

[*74] *SECTION IV.

Of the Principles of Taxation.

It has been stated, (*a*) that the Court of Chancery makes a distinction, which does not exist at law, with regard to the principle upon which the Master is to proceed in the taxation of costs, and that this distinction is marked by the term of costs "*as between party and party*," and costs "*as between solicitor and client*," (*b*) the Court in the latter case permitting a larger proportion of expenditure to parties holding particular characters, or placed in particular situations, than in others.

With respect to the extent of the difference between the costs allowed upon one principle of taxation, and those allowed upon the other, however important in its consequences, it is not one respecting which any definite rules can be laid down: as far as they can be stated, however, they are clearly expressed by Mr. Sidney Smith, whose experience as an officer of the Court, stamps what he states upon this subject with authority of no inconsiderable weight. (*c*)

[*75] *According to that gentleman's statement, the principle, in a taxation as between party and party, is to have a fixed allowance for every proceeding in a suit, which is not varied to meet the circumstances of any particular case. Thus, the 13*s.* 4*d.*, which is allowed as instructions for a bill, covers, *in every case*, all the trouble which a solicitor has in getting together the materials for the suit. It is also a principle to allow or disallow the costs of any proceeding entirely with reference to the result, without regard to the reason upon which such a proceeding was undertaken. Thus, the costs of making or opposing a motion or petition, (in the absence of any special direction to the contrary,) are allowed or disallowed, in the general costs of the suit, entirely with reference to the success of the motion or opposition. (*d*)

In costs, as between solicitor and client, the principle is to allow the party as many of the charges which he would have been compelled to pay his own solicitor, as fair justice to the other party will permit.

It must not, however, be supposed that, in such a taxation, where the costs are to come out of the pocket of the opposite party, the party, whose costs are to be taxed, is to be allowed every thing which his own solicitor might claim against him upon the taxation of his bill. "At first sight," observes Mr. Smith, "a party who is to have his costs, as between solicitor and client, seems to be

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(*a*) *Ante*, p. 2.

(*b*) There is also another species of costs which is sometimes mentioned in the books, viz: costs "*out of purse*," or "*out of pocket*," *vide* Aubrey v. Aspinall, Jac. 441; exp. Simpson, 15 Ves. 476.

It does not distinctly appear in the books, what particulars these costs comprehend, but it is presumed that they are confined, as their name imports, to those costs which the party who is to receive them has actually paid out of his *pocket or purse*. Mr. Beames, however, appears to think that they are considered as larger costs; *vide* Beames on Costs, (ed. 1840) p. 144, n. (b). There is also another species of costs, the mention of which frequently occurs, viz: "*fixed costs*," which term is merely made use of in contradistinction to *taxed costs*, (*i. e.*, those costs which are the subject of taxation,) in cases where the Court, instead of referring to the Master to tax the costs, at once names a specified sum to be paid by the party, as in the case of costs of the day, which, instead of being taxed, are now fixed at £10, unless the Court make order to the contrary; *ante*, vol. 2, p. 619. The Court will also name a specified sum, instead of taxed costs, to avoid the expense of taxation, where the sum is very small. Wilding v. Wilding, 4 Bro. C. C. 100. The practice of giving *exemplary* costs has been, as we have seen, discontinued. *Ante*, p. 3, n. b.

(*c*) 2 Smith, 637. (*d*) 2 Smith, 637.

entitled to every thing that can be claimed against him by his own solicitor; but, in the details of taxation, there are many charges, which are proper against the client, which it would be improper to fix upon a third party. To take one among many instances—where a defendant, by his own delay, suffers himself to be put in contempt, it is quite fair that he should bear the expense of his own neglect, but it would be very hard to take those costs out of a fund in which any other person is interested." (*e*) In taxing costs, therefore, as between solicitor and client, two distinct principles are adopted, one where the costs are to paid out of a general fund, the other where they are to be paid out of the fund of the party himself. *This distinction, however, is never made in the order directing the taxation, but only when the order is acted upon; and, if it is intended that the party, whose costs are to be paid out of a general fund, should be fully indemnified against all expenses, care must be taken to have it so expressed in the order, as it will not be sufficient that the costs are directed to be taxed as between solicitor and client. (*f*) [*76]

The above observations will suffice to convey a general outline of the distinction between costs as between party and party and as between solicitor and client; we will now proceed to inquire in what cases the Court will direct the costs of a suit to be taxed upon either principle, or rather in what cases the Court will direct the costs of a party to be taxed as between solicitor and client, the general rule of the Court being, that all costs are to be taxed as between party and party, except where they are specially directed to be taxed as between solicitor and client, from which the corollary follows, that, where the Master is simply ordered to tax the party the costs of the suit, it is always construed to mean "as between party and party." (*g*)

It may be mentioned in this place, that, where the Court has once adopted the principle of taxation as between solicitor and client, in favour of a particular individual, or of a particular class, it will, in its future proceedings, wherever it becomes necessary to direct a further taxation of costs, direct them to be made upon the footing of the former taxation; thus, if, upon the original hearing, the costs of a party have been ordered to be taxed as between solicitor and client, it will, at the hearing upon further directions, direct the subsequent costs of the same party to be taxed in the same manner, even though a different state of circumstances should appear from the Master's report from that which was supposed to exist at the original hearing. (*h*) It is to be recollected, however, that it is only where the former direction for taxation has been made at a hearing of the cause, either original or upon further directions, that the Court will consider itself bound by it, at the *subsequent hearing, and that it will not do so where the former direction as to costs has been made upon petition and by consent. (*i*) [*77]

It appears to be the general rule of the Court, that, when personal representatives and other trustees are entitled to costs "*out of the fund*," such costs will be directed to be taxed as between solicitor and client. It is, however, in general, only in cases in which there is a fund under the control of the Court, that such a direction will be given; where there is no such fund, or a bill against a trustee is dismissed, the costs awarded to the trustee will be only the ordinary costs. (*k*)

(*e*) Ibid.
(*f*) 2 Smith, 637.
(*g*) 2 Smith, 636.
(*h*) *Vide ante*, vol. 2, p. 971.
(*i*) *Vide ante*, vol. 2, p. 971.
(*k*) Edenborough v. The Archbishop of Canterbury, 2 Russ. 93, 112. In this case, however, the Court gave costs, as between solicitor and client; the Archbishop and Bishop

Thus, where a testamentary paper was held void for uncertainty, and the bill was dismissed with costs, it was suggested that some of the defendants, being trustees, should receive their costs, as between solicitor and client, but the Court, on the ground that they were trustees of a nullity, and that there was no fund out of which such costs could come, refused to allow them their costs as between solicitor and client, and dismissed the bill, therefore, with costs as between party and party. (*l*)

So a person who was named in a deed as a trustee, but had not executed the deed, or in any manner accepted the trust, and who, by his answer, had altogether declined it, upon the bill being dismissed against him, was held not to be entitled to have it dismissed with costs, as between solicitor and client, but only with the ordinary costs between party and party. (*m*)

[*78] *It has been already stated, (*n*) that in a charity case, where an heir-at-law was made a defendant, pursuant to an order of the Court, he was allowed his costs as between solicitor and client although there was no resulting trust in his favour, (*o*) and it seems that, in general, in charity cases, the heir will, if he makes no improper point, be awarded his costs as between solicitor and client. This rule was acted upon in *Currie* v. *Pye*, (*p*) and in *Moggridge* v. *Thackwell*, (*q*) in which case the heir-at-law, as well as the Attorney General and all the other parties were allowed their costs out of the fund, to be taxed upon the same principle.

It seems also, that, in general, where the object of a suit is to establish a charity, and the estate is ample, the costs of all parties, out of the fund, will be taxed as between solicitor and client; (*r*) and, in *Attorney General* v. *Carte*, (*s*) where the decree had merely ordered that the parties should be paid their costs to be taxed by the Master out of the estate, without giving any direction as to the principle of taxation, in consequence of which the Master refused to tax the costs otherwise than as between party and party, the Court entertained a petition for an order that the taxation of the costs should be as between solicitor and client.

Upon the first hearing of *Moggridge* v. *Thackwell*, (*t*) Lord Thurlow gave all the parties their costs out of the estate, as between solicitor and client, on the ground that it was a cause between relations; but Lord Eldon, when it came before him, upon a rehearing, although he made a similar order as to the costs, did so, as well upon the ground that Lord Loughborough had intimated an opinion that the cause ought to be reheard, as upon the circumstances of the case; but it is to be observed that it is by no means the rule, that, in suits

[*79] amongst relatives as to the distribution of a fund, the costs of *all parties are to be paid out of the fund, as between solicitor and client; and that, in a suit by some of the next of kin of an intestate, against the administrator and others of the next of kin, for an account and distribution of the intestate's estate, the administrator is the only party entitled to have his

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of London, who had been made parties to the suit for the purpose of restraining the induction of an incumbent to a living, or from availing themselves of any lapse which might occur pending the suit; this it did on the authority of Townshend v. The Bishop of Norwich, which occurred in 1824.

(*l*) Mohun v. Mohun, 1 Swanst. 201.

(*m*) Norway v. Norway, 2 M. & K. 278; over-ruling Sherratt v. Bentley, 1 R. & M. 655.

(*n*) *Ante*, p. 9.

(*o*) Atty. Gen. v. Haberdashers' Comp. 4 Bro. C. C. 178; *vide etiam* Atty. Gen. v. Tonna, Belt's note to ib. and Beames on Costs, Appx. 18.

(*p*) 17 Ves. 462.

(*q*) 1 Ves. J. 464; 7 Ves. 36, 68.

(*r*) Ibid.; and *vide* Atty. Gen. v. Carte, Beames on Costs, Appx. 2; 1 Dick. 113, S. C.; and Bishop of Hereford v. Adams, 7 Ves. 324; Osborne v. Denne, ibid. 424.

(*s*) *Ubi supra.*

(*t*) 1 Ves. J. 475.

costs taxed as between solicitor and client, and the plaintiff and the other next of kin will not have more than the ordinary costs. (*u*) So also, where a bill was filed by one of two residuary legatees for the administration of the estate, the other residuary legatee being a defendant, the usual decree was made; and upon the question being raised, at the hearing on further directions, whether the costs of the plaintiff and defendant should be paid out of the fund, as between solicitor and client, the Vice Chancellor, after an inquiry into the practice, stated that he could not give the costs out of the fund in Court, as between solicitor and client, without the consent of the defendant. (*x*)

Where a bill has been filed for the general benefit of creditors and legatees, and the estate has proved insufficient, the Court has been in the habit, of late years, of giving the plaintiff his costs of the suit out of the fund realized by his exertions as between solicitor and client. This rule was adopted by Lord Lyndhurst, in *Turner* v. *Turner*, (*a*) and has been sanctioned by Lord Brougham, (*b*) by Lord Cottenham, when Master of the Rolls, (*c*) and by Sir L. Shadwell, V. C.; (*d*) and it equally applies where the bill has been filed by a simple contract creditor and the specialty creditors have proved debts to an amount exceeding the value of the assets received. (*e*) But it is only where the fund is insufficient, that the plaintiff, in a suit of this description, will be entitled to have his costs taxed in so favourable a manner; where the fund is adequate, he will only have his costs as between party and *party. [*80] In a recent case, (*f*) however, where, in a creditor's suit, a fund had been realized by the diligence of the plaintiff, and the assets were more than sufficient for the payment of the debts, Lord Langdale, M. R., considering it a hardship that creditors not parties to the suit should come in and reap the benefit of it, without contributing to the plaintiff's extra costs, made an order, by which it was directed that the plaintiff's costs, as between party and party, should be paid out of the fund, and that his extra costs should be paid *pro ratâ*, by all the creditors who partook of the benefit of the suit. (*g*)

It may be mentioned here, that where, in a creditor's suit, the costs of all parties had, upon further directions, been ordered to be taxed as between solicitor and client, and paid out of the fund, and upon taxation the fund proved insufficient to pay all the costs, the Vice Chancellor, upon a petition by the heir and administrator of the debtor, praying that their costs might be paid in the first instance, refused to vary the order, which had been made upon further directions, but directed the fund to be divided amongst all parties, in proportion to their costs. (*h*)

It has been stated, in a former part of this work, (*i*) that, in almost every decree directing an account, there is inserted a declaration that "the Master is

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(*u*) Trezevant v. Fraser, Rolls, Aug. 1839.

(*x*) Fenner v. Taylor, 5 Mad. 470; Mad. & Geld. 3, S. C.

(*a*) Cited 2 R. & M. 687.

(*b*) Hood v. Wilson, ib.; over-ruling Young v. Everest, 1 R. & M. 426; and Rowlands v. Tucker, ib. 635.

(*c*) Larkins v. Paxton, 2 M. & K. 32. (*d*) Tootal v. Spicer, 4 Sim. 510.

(*e*) Barker v. Wardle, 2 M. & K. 818, *ante*, p. 60.

(*f*) Brodie v. Bolton, 3 M. & K. 168.

It may be remarked here, that where a creditor files a bill on behalf of himself, &c., the defendant may apply to the Court, by motion, at any time before the decree, on payment to the plaintiff of his demand and costs, and that, in such case, the plaintiff's costs will only be taxed as between party and party. Pemberton v. Topham, 1 Beavan, 316. If there are any other defendants to the suit, their costs must also be paid. Ibid.

(*g*) Stanton v. Hatfield, 1 Keen, 358. The plaintiff could have avoided this hardship, by calling upon the other creditors who came in under the decree, to contribute to the expenses of the suit, at the proper time. *Vide ante*, vol. 2, p. 863.

(*h*) Swale v. Milner, 6 Sim. 572. (*i*) *Ante*, vol. 2, p. 887.

to make unto the parties all just allowances," and that, under the head of just allowances, whatever a trustee or personal representative may have expended, in the fair execution of his trust, will be allowed him in passing his account; this, however, applies only to cases in which an account is directed, and it frequently happens that, in suits to which trustees or personal representatives are parties, either as plaintiffs or defendants, and which do not *involve any account, the trustees, &c. have incurred expenses which it is very right they should be reimbursed, but which do not fall under the denomination of costs of the suit, even when directed to be taxed as between solicitor and client. Of this nature are cases laid before counsel, for their opinion preparatory to the institution of the suit, and many other charges of that description, which, where there is a decree directing an account, a trustee would be considered entitled to, under the head of just allowances, (*l*) but which, where there is no decree for an account, and consequently no opportunity of claiming just allowances, a trustee would be in danger of losing, especially in cases where the suit does not involve property out of which they can be retained, or disposes of the whole of it, were it not that, in such cases, the Court will extend the order for the taxation of costs, as between solicitor and client, to "*Charges and Expenses properly incurred*," by the trustee. Under such a direction as this, the trustee may obtain all such expenses as he has properly incurred relating to the trust property, in or in connexion with the suit, although they are not properly costs in the cause. The direction to tax costs, charges, and expenses, will also, it is stated, be given in the case of a party interested in the fund, where they are payable out of the party's own fund. (*m*)

[*81]

SECTION V.

Method of Taxation, &c.

THERE are two methods in which the order as to the taxation of costs may be drawn up,—sometimes it is referred to *the Master to tax the costs, and at other times the taxation is only referred to him "in case the parties differ about the same."

[*82]

Where the Court refers it to the Master to tax the costs of a party, the Clerk in Court, or solicitor of the party who is to have them, must deliver a bill of his costs to the Master, who is to tax them, and who furnishes the other side, if desired, with a copy. The attendance of the parties interested, or the solicitors, at the taxation, is enforced by warrant, in the same manner as their attendance upon other references, which must be renewed as often as may be necessary till the completion of the taxation. (*a*)

Where the decree orders a party to retain his costs, when taxed, out of the balance in his hands, and to pay the residue into Court, if he delays to get the

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(*l*) *Ante*, vol. 2, p. 888.

(*m*) 2 Smith's Pr. 638. It is not usual to give a party his "*charges and expenses*," where there is no fund in Court; but where a defendant put in four insufficient answers, and was committed till he was examined upon interrogatories, Lord Eldon, upon discharging him after putting in his examination, ordered him to pay to the plaintiff his costs, charges, and expenses. Farquharson v. Balfour, T. & R. 184; *ante*, vol. 2, p. 326.

(*a*) Prac. Reg. 146.

costs taxed, the proper course is for the other party to move that he may bring his bill of costs to be taxed within a limited time. (*b*)

Where a Master is directed to tax costs, "in case the parties differ about the same," the order of proceeding is pointed out by the 57th order of 1828, as amended in 1831, and is as follows:—The party claiming the costs must bring the bill of costs into the Master's Office, and give notice of his having so done to the other party; (*c*) and, at any time within eight days after such notice, such other party shall have liberty to *inspect the same, without fee, and may take a copy thereof, if he thinks fit; and must, at or before [*83] the expiration of the eight days, or such further time as the Master shall in his discretion allow, either agree to pay the costs or signify his dissent therefrom, whereupon he shall be at liberty to tender a sum of money for the costs; but, if he makes no such tender, or if the other party refuses to accept the sum so tendered, the Master is then to proceed to tax the costs, according to the practice of the Court; and, in case the taxed costs shall not exceed the sum tendered, then the costs of the taxation are to be borne by the other party.

An order directing the costs of a suit to be taxed, warrants the taxation up to the time of the Master's making his report, (*d*) and this it has been held to do, notwithstanding a reservation of subsequent costs, "not provided for by the decree," there being other costs by which these words might be satisfied. (*e*) Where subsequent costs are not intended to be given, the direction should be confined to costs up to the decree, and the question as to subsequent costs should be reserved. (*f*)

An order directing the taxation or payment of costs by two or more parties, is joint and several, and, if one of them dies, the costs may nevertheless be taxed and recovered against the others; (*g*) therefore, where, in a suit by several plaintiffs, the costs of the defendants were ordered to be taxed and paid by the plaintiffs, one of whom died, but the Master, nevertheless, proceeded with the taxation of the costs, an application to quash the Master's certificate was refused, the Court being of opinion that the proceeding was regular. (*h*) Upon the same principle, in a tithe suit, where there was a general decree for the taxation and payment of costs by all the defendants, and they all died but one, an application by the survivor to have the costs of the defendant apportioned, so as to relieve him from the costs of the other defendants, was refused. (*i*)

*A bill of costs should be prepared from the entries of payments [*84] and attendance in the solicitor's own books. (*k*)

(*b*) Newsome v. Shearman, 2 S. & S. 95. In this case the application was, that the defendant might pay the whole sum due from him into Court; but the motion was refused as inconsistent with the order.

(*c*) In Aubrey v. Hoper, 5 Russ. 1, it was insisted, that, by the practice as it existed before the order, the party claiming the costs ought not to carry in his bill to the Master, till he has given the other side an opportunity of examining the same, by furnishing him with a copy of it; and it was contended that the same practice ought to continue under the new order; but, from a certificate of the Clerks in Court then produced, it appeared that, under the old practice, it was not incumbent upon the party claiming the costs, to take a bill of costs to the party required to pay the same, or to his solicitor, but the party claiming the costs was at liberty to take the bill of his costs into the Master's Office in the first instance, and it was the practice of the Master's Office to proceed in the taxation of such a bill, as in any other ordinary case, upon warrants being taken out for that purpose. The Court, therefore, decided that, under the new order, the party to recover the costs need not give to the other party a copy of his bill before carrying it to the Master's Office.

(*d*) Quarrell v. Beckford, 1 Mad. 286, and *vide* Clutton v. Pardon, T. & R. 301, 4.
(*e*) Quarrell v. Beckford, *ubi supra*.
(*f*) Ibid. *et. vide* Seton on Decrees, 40.
(*g*) *Vide* Poole v. Franks, 1 Mol. 78.
(*h*) Meredyth v. Hughes, 3 Y. & J. 188.
(*i*) Michel v. Bullen, 6 Price, 87.
(*k*) 2 Smith, Pr. p. 644.

The plaintiffs, however numerous, can have but one bill of costs: and the same rule applies to defendants appearing by the same solicitor, however large their number or however diversified their interests: thus, if one solicitor is concerned for any number of defendants, whatever their interests may be, he is only entitled to one bill of costs for them all, although he may, in that bill, charge for separate answers of any of them, or for the employment of separate counsel, for any of them at the hearing. (*l*) In such cases, however, he can charge only one term fee and one attendance in Court for all of them. (*m*)

If one or more of several defendants, defending by the same solicitor, present a petition, and the rest, having a different interest to the petitioners, cannot join in the petition, but appear upon it to consent or to submit to the order of the Court, and all are ordered to have their costs of the petition, the solicitor can only be allowed one bill of costs; nor can he be allowed for separate attendances in Court, but only for separate briefs and separate fees to and attendance upon counsel. (*n*)

If a town solicitor happens to be concerned as agent for two different solicitors in the country, or if he himself is properly concerned for some defendants and as agent for others, the case is different, and he will be allowed to bring in two bills of costs; but he must, from the beginning of the suit, keep the defences separate, and take double copies of the bill, &c., as if two solicitors were employed; if he does otherwise, he will be allowed only one bill of costs, and the two solicitors in the country must divide the fees between them. (*o*)

In taxing costs, the Master is the sole judge of the fact, whether the business has been done, and of the proper charge to be made, and his decision upon this subject is final. It is also the Master's duty to inquire, whether the business [*85] was required to be done; for if the solicitor negligently or ignorantly takes any *unnecessary proceedings, it is the duty of the Master to protect the client from any charge in respect of such proceedings. (*p*) In order to assist the Master in the performance of his duty, he is generally attended, upon the taxation of costs, by the Clerks in Court of the parties; and it has become the practice, of late years, to leave the taxation of costs, in their detail, wholly to the Clerks in Court; for, in the multiplicity of business that is now before the Court and in the Master's Offices, it has been found of the greatest convenience, to all parties, that the Masters should be called upon to decide only upon questions of principle in the taxation of costs. (*q*)

When it is referred to the Master to apportion the costs of a suit, where part of them only are given to the plaintiff, and no costs are given as to the rest, in this case, the Master or Clerks in Court look over all the folios of the bill, answers, depositions and proceedings, and only the usual fees of such folios and proceedings as relate to the matter prevailed in are allowed. (*r*) In doing this, however, the proper course appears to be, to apportion the costs of all the general proceedings in the cause, so that the party receiving the costs should have a fair proportion of the costs of each proceeding, and not merely those costs which were occasioned by the particular portion of the proceedings of which he is to have the costs. This principle was adopted in a recent case, where, in a suit for the administration of assets, the executor was charged with interest on the balances in his hands, and it was referred to the Master to tax the plain-

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(*l*) As to costs of separate answers, where the same solicitor is concerned, *vide ante*, vol. 2, 266.

(*m*) 2 Smith, Pr. 643. (*n*) Ibid.

(*o*) Ibid.

(*p*) Alsop v. Lord Oxford, 1 M. & K. 565.

(*q*) *Vide* Mr. Mills's Evidence, Chan. Rep. Appx. B. No. 25, p. 557.

(*r*) For. Rom. 206.

tiffs their costs, as to so much of the suit as sought to charge the executor with interest. The Master, in his taxation of the costs, allowed the plaintiff a portion of every general proceeding in the suit, whereupon the executor presented a petition complaining of the taxation, and insisting that he ought to have been charged with so much only of the costs of the suit as related to the question of interest; but the Master of the Rolls, (Lord Langdale,) acting upon the certificate of several of the most experienced Clerks in Court, who *were not concerned in the cause, held that the principle of taxation which had been adopted was right, and dismissed the petition with costs. (*c*) [*86]

Where one solicitor appears for three several defendants, and the bill, as to one of them, is dismissed with costs, the plaintiff can only be compelled to pay the costs of such proceedings as exclusively relate to that defendant, and one third of the costs of the proceedings taken for all three defendants. (*d*) And it has been held, that where a solicitor appears in a suit for several defendants, one of whom is entitled to his costs out of the fund, and the others not, the costs of the one entitled, are only that proportion of the costs due to the solicitor, with which the solicitor, as between the co-defendants for whom he has acted, could have charged the party entitled. (*e*)

It is to be noticed, that if, upon the taxation of costs, it should be made to appear, that the person who acted as solicitor for either of the parties, had not, at the time such costs were incurred, been admitted a solicitor of the Court, the Master may disallow the whole of such costs, except disbursements to the Clerk in Court, although they have been actually paid by the party, (*f*) even though the costs may have been incurred in a case for the opinion of a Court of Law, directed out of this Court, (*g*) or upon an arbitration under an order of the Court; (*h*) and the person acting as solicitor, had been admitted an attorney-at-law, and has since been admitted a solicitor of the Court. (*i*) And it seems that, even if the fact, *that the party was not a solicitor, should be discovered after the costs have been taxed and paid, the Court will entertain a petition to have them refunded. (*k*) [*87]

It is stated, by Lord Chief Baron Gilbert, (*l*) that, "by an order of the Court, made in my Lord Keeper Wright's time, no exceptions were allowed to a report of taxing costs;" and "that this rule hath ever been pursued, but with this difference, that where the Master allows such costs as ought not to be allowed, or are not allowable by law,—in this case, the Court will, sometimes, indulge the party with liberty of excepting, touching this point only; but this very seldom or ever falls out, though in some cases it hath been done."

(*c*) Heighington v. Grant, 1 Beavan, 228. *Vide etiam* the mode of taxation adopted in that case, as set out in Mr. Mills's certificate, ib. 231, and 2 Smith's Pr. 340, 2 ed.; *vide etiam* Pitt v. Mackreth, 3 Bro. C. C. 321.

(*d*) 2 Smith's Pr. 642. A defendant to a suit in Chancery, appearing by the same solicitor that is employed for other defendants, is not liable to such solicitor for more than his own share; but plaintiffs in a suit are jointly and severally liable to their solicitor, for the whole costs of the suit; ib.

(*e*) Harmer v. Harris, 1 Russ. 157.

(*f*) Prebble v. Boghurst, 1 R. & M. 744. If the Master, upon the objection being taken, refuses to disallow the costs, the Court will, upon petition, direct him to review his report, and to disallow the costs in question; Sumner v. Ridgway, ib. 748.

(*g*) Prebble v. Boghurst, *ubi supra*. (*h*) Ibid.

(*i*) Ibid. (*k*) Coates v. Hawkyard, 1 R. & M. 746.

(*l*) For. Rom. 206.

The rule acted upon at present, is very nearly the same; and, generally speaking, it is held, that the Master's report as to costs is final, and that exceptions do not lie to it; (*m*) for the Master is much more competent than the Court, to determine the proper amount of charges. When, however, it said, that the Master's report as to costs is final, the *dictum* must be understood as applying only to the *quantum* of costs allowed or disallowed by the Master. (*n*) If the Master has omitted to tax the costs which have been directed to be taxed, or if it is conceived that in taxing them he has adopted some general principle which cannot be supported, the party complaining has a right to bring that point before the Court. (*o*)

The question, in what manner an objection to the Master's report of costs is to be brought before the Court, is one, which has given rise to considerable discussion.

In *Pitt* v. *Mackreth*, (*p*) Lord Thurlow said, that an exception had never been allowed for costs only; and that the regular method was, to state the articles the party meant to object to, in a petition, and to pray leave to except. In *Holbecke* *v. *Sylvester*, (*q*) a similar doctrine was laid down by Lord Eldon, who said, he understood the practice to be, that if the Master has proceeded upon the costs, but has not allowed several items which are claimed, there must be a petition; (*r*) and this appears to be now the general course of proceeding in cases where objections are taken to the principle upon which the Master acted in the taxation of costs. (*s*)

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In *Holbecke* v. *Sylvester*, (*t*) a distinction was attempted at the bar, between cases in which there is an exception for costs only, and those in which the party excepts upon any other ground; in which cases, it was contended, he may add an exception for costs; but in *Lucas* v. *Temple*, (*u*) Lord Eldon expressed doubts as to that distinction, and observing that frivolous objections would be taken, merely for the sake of objecting for costs, said his opinion was, that exceptions would not lie for *items* of costs which were items properly falling within the description of those costs which the Master was to tax. It is to be observed that, in the above case, Lord Eldon lays stress upon the circumstance, that the objection was to *items* of costs falling within the description of those costs which the Master was to tax; if the decree has directed costs, and the Master has not taxed them at all, you may except; this distinction was taken by his Lordship himself, in *Holbecke* v. *Sylvester*, before referred to.

It is to be noticed, that the application to the Court, to review a Master's certificate of taxation, must be by petition, specifying the *items* objected to, and praying for leave to except to the report, and that a motion for leave to except will not be regular. (*x*) But, although the general form of application

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(*m*) Lucas v. Temple, 9 Ves. 299; Fenton v. Crickett, 3 Mad. 496; Alsop v. Lord Oxford, 1 M. & K. 564.

(*n*) Holbecke v. Sylvester, 6 Ves. 417.

(*o*) Shewell v. Jones, 2 S. & S. 172.

(*p*) 3 Bro. C. C. 321.

(*q*) 6 Ves. 417.

(*r*) It is remarkable, that, in the above case, his Lordship allowed an exception which had been taken to the Master's report, on the ground that, in taxing the costs of the plaintiffs, (mortgagees,) relating to their mortgages, he had disallowed the costs occasioned by making certain persons, who were necessary parties, defendants. It may be, that he considered that such disallowance was, in fact, an omission to tax part of the costs, which were directed by the decree to be taxed.

(*s*) *Vide* observations of Sir W. Grant, M. R., in Purcell v. M'Namara, 12 Ves. 170; Fenton v. Crickett, 3 Mad. 496; *Ex parte* Leigh, 4 Mad. 394; Shewell v. Jones, 2 S. & S. 170–172; *vide etiam* Russell v. Buchanan, 9 Sim. 167.

(*t*) *Ubi supra.*

(*u*) 9 Ves. 299.

(*x*) Attorney General v. Brown, 1 M. & K. 567.

*to the Court is by petition for liberty to except, the practice of the Court, if it concur with the view taken by the petitioner, is not to [*89] put him to take exceptions, but to refer it back to the Master, with directions to review his report, and to make such alteration in it as the justice of the case may require.

SECTION VI.

Payment of, how enforced.

According to the ancient practice of the Court when costs are ordered to be taxed and paid by *one party to another*, the Master, having taxed the costs, certifies the *quantum* to the Court; which certificate being filed, and an office copy thereof produced to the Clerk of the Subpœna Office, and a *præcipe* for a *subpœna* left with him, a *subpœna* may be sued out, (*a*) in the form pointed out by the orders of the 21st December, 1833, which is as follows:—

Victoria, &c.—To ——— —— Greeting. *We command you,* (and every of you,) *that you pay or cause to be paid immediately after the service of this writ, to or the bearer of these presents, £ costs, by our Court of Chancery adjudged to be paid by you to the said under pain of an attachment issuing against your person, and such process for contempt as the Court shall award in default of such payment.*

Witness, &c. Devon.

Where the Master is directed to tax the costs of the plaintiff and of a defendant, and it is ordered that the costs of such defendant, when taxed, shall be paid by the plaintiff, and that another defendant shall repay to the plaintiff the amount of the first defendant's costs, together with the plaintiff's own costs, the plaintiff cannot obtain separate *subpœnas* against the defendant who is to pay the costs, for the costs of the *other defendant and for his own; but he must either get the Master to tax the costs of the [*90] defendant and his own costs, and certify the whole in one certificate, which he will do, if the plaintiff produces the receipt of the defendant for the amount of his costs; or he may have two certificates, one for his own costs, and the other for the costs of the defendant, and produce the receipt of the defendant, together with the certificate, at the Subpœna Office; in which case, one *subpœna* will be allowed for the amount of the two certificates. (*b*)

The service of a *subpœna* for costs, must be personal on the *party required* to pay them; (*c*) if, however, he is not to be found, the Court will, on motion, order that service of it upon his Clerk in Court may be good service, as in the case of a writ of execution of a decree. (*d*)

The service of a *subpœna* for costs is not like a *subpœna* for any other purpose, limited to the last day of the term next following the term or vacation in which it was sued out; (*dd*) but it must be effected within the jurisdiction of the Court, unless there is a special order of the Court to authorize its service elsewhere. Thus, in *Hawkins* v. *Hall*, (*e*) where a *subpœna* for costs was

(*a*) The method of suing out a *subpœna* for costs, is the same as that of suing out a *subpœna ad respondendum*. *Vide Ante*, vol. 1, 560.

(*b*) 1 Smith's Pr. 454.

(*c*) For the method of serving a subpœna, *vide ante*, vol. 1, p. 563.

(*d*) *Vide ante*, vol. 2, 706. (*dd*) Ord. 1833, VII.

(*e*) 1 Beav. 73.

served upon the plaintiff at *Boulogne*, and he was afterwards arrested upon an attachment issuing upon that service, the Master of the Rolls, Lord Langdale, set the attachment aside for irregularity.

In the same case, (*f*) after the order to discharge the attachment was made, but before it could be drawn up and served, another *subpœna*, for the same costs, was served, and another demand made upon the plaintiff, whilst he was in custody upon the irregular attachment, upon which service and demand, another attachment for the same costs was issued and executed in what is termed the lobby of the prison. Upon another application being made to discharge the plaintiff out of custody, upon the ground 1st, that the *subpœna* for costs was irregularly served; and, 2ndly, that he was privileged to leave the prison freely [*91] for the purpose of returning home; and *the Master of the Rolls, without deciding upon the second ground, held that the service of the second *subpœna* upon the plaintiff, whilst in custody upon an illegal process, issued by the same party, was irregular, and therefore discharged him; and his Lordship's decision was afterwards confirmed by the Lord Chancellor, upon a motion to discharge the order of the Master of the Rolls. (*g*)

It may be observed, that where there is a *joint* order for payment of costs by *two or more persons*, the order is considered as joint *and several*, and that, in such case, if one of the individuals to pay abscond, or cannot be served, a proceeding against the other will be good. (*h*)

So also, if one of the parties to pay the costs dies before they are paid, or even before they are taxed, the survivors may be proceeded against, notwithstanding the parties to pay the costs were the plaintiffs and the death of one of them has occasioned an abatement of the suit. (*i*)

It will be recollected, that, in the case of a writ of execution of a decree or order for payment of money, if the party to receive the money does not serve it himself, it is necessary that the person who does serve it, should have, and shew to the party on whom he serves it, a letter of attorney from the person to receive the money, authorizing him to receive it for him; (*k*) and, in some books of practice, it is stated that this process is necessary in the case of a *subpœna* for costs, where the person serving it is not the party to receive it. (*l*) This, however, appears to be a mistake, for, as the *subpœna* directs the costs be paid either to the person named or to *the bearer*, it is not necessary that the bearer should have any other authority to receive the costs than the writ itself. (*m*)

The person serving the *subpœna*, whether he be the party entitled to the costs or "*the bearer*," must, however, at the time of service, make a demand of the amount of the costs. (*n*)

[*92] *If the party refuse or neglect to pay the costs upon personal service and actual demand, an affidavit of the personal service, demand, and refusal, or neglect, being made by the person serving the process, (*o*) and left with the Clerk in Court, he will, where the party does not enjoy the privilege of Parliament, make out an attachment, (*p*) upon non-com-

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(*f*) Ibid.
(*g*) Hawkins v. Hall, 4 M. & C. 280.
(*h*) *Vide ex parte* Bishop, 8 Ves. 333.
(*i*) Meredyth v. Hughes, 3 Y. & J. 188; and *vide* Michel v. Bullen, 6 Price, 87.
(*k*) *Ante*, vol. 2, p. 705.
(*l*) Prac. Reg. 406.
(*m*) *Vide* Beames on Costs, (ed. 1840,) p. 167; 1 Harr. ed. Newl. 194.
(*n*) Hawkins v. Hall, 4 M. & C. 280; 1 Harr. 194; Beames's Ord. 170.
(*o*) An affidavit stating the confession of the party of his having been served with a subpœna for costs and of his not having paid them, has been held sufficient. Cary, 161; Hind. 258 (n).
(*p*) 1 Harr. 195. In the Practical Register, 146, 407, the practice is stated as follows: "The report being confirmed, and the order duly entered, there may be a subpœna to the party to pay them, and, *if not thereupon paid, the order under seal; or if after decree,*

pliance with which the whole line of process, already pointed out (*q*) for enforcing obedience to a writ of execution, may be awarded.

It is to be recollected, that the process of the Court to enforce obedience to a *subpœna* for costs, against a party not entitled to privilege, like the process to enforce obedience to a writ of execution for the payment of money, is not a bailable process, (*r*) although, it seems, that if a Sheriff, after taking a party upon an attachment for costs, lets him out upon bail, and, *before the return of the attachment*, retakes him, his liability will not be enforced. (*s*)

Where the party served with the *subpœna* for costs, is entitled to the privilege of peerage, or is a Member of the Commons House of Parliament, the method of enforcing obedience is by sequestration, &c., as pointed out in the case of disobedience, by a party so privileged, to a writ of execution.

The course of proceeding, to enforce the payment of costs by a corporation aggregate, has been shewn in a former part of the present Treatise. (*t*)

It is to be remarked that the process by *subpœna* is necessary in those cases only in which *costs alone* are to be paid by one party to another. Where a debt or legacy, as well as *costs are ordered to be paid to the same person, *a writ of execution* will cover the costs as well as the debt or legacy, and therefore, in such cases, a *subpœna* is unnecessary. (*u*) [*93]

The above methods of proceedings apply to all cases in which costs, under the ancient practice, are to be recovered by *subpœna* or writ of execution; but it is to be observed, that some costs are not recoverable either by *subpœna* or writ of execution. Amongst these may be reckoned the costs of contempt. The costs of contempt for want of appearance, are enforced by the Clerk in Court refusing to accept the appearance unless the costs are paid; so, also, in the case of contempt by not putting in an answer, he refuses to accept the answer until the costs of the contempt are discharged, (*x*) or if the answer has been filed, without payment of the costs, he may move to take it off the file for irregularity. (*y*) In other contempts, also, where the party is in custody, the detaining party should take care that the Sheriff or other officer does not discharge the prisoner, or that he does not sanction his being discharged until he has paid the costs of contempt. (*z*) The costs of amending a bill must be paid before the bill can be regularly amended. (*a*) The payment of the costs of exceptions submitted to, is a necessary part of the submission.

In almost all other cases, however, costs payable by one party to another, are recoverable by *subpœna* or writ of execution, and, by the orders of December, 1833, the party to whom the costs of applications by warrant, under the 3 & 4 W. 4, c. 94, are directed to be paid, is entitled to sue out a *subpœna* for the same. (*b*)

It may be mentioned here, that, where a suit was instituted by a next friend, on behalf of an infant, and the defendant was ordered to pay the costs, but absconded to avoid the process, the Court, the *prochein amy* being very poor,

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the decretal order and writ of execution; and if, upon due service thereof, the costs be not paid, then, upon affidavit thereof, an attachment, &c.;" *vide etiam* 1 Newl. Pr. 408. This statement, however, as far as regards *the service of the order under seal or decretal order and writ of execution*, after a subpœna, appears to be incorrect; *vide* Beames on Costs, ed. 1840, p. 165, and 1 Harr. *ubi supra*.

(*q*) *Ante*, vol. 2, p. 708.
(*r*) *Ante*, vol. 2, p. 709.
(*s*) Collard v. Hare, 5 Sim. 10.
(*t*) Vol. 1, p. 194.
(*u*) Beames on Costs, ed. 1840, p. 166. As the writ of execution does not authorize payment to the *bearer*, if the *bearer* is not the person named in the writ to receive, there must be a power of attorney; vol. 2, p. 705.
(*x*) *Vide ante*, vol. 1, p. 660.
(*y*) 1 Smith, 457.
(*z*) Ibid.
(*a*) Ibid.
(*b*) Ord. 1833, XXIII.

[*94] ordered the *costs to be raised and paid out of a fund which had been realized in the suit for the benefit of the infant. It is stated, however, that the Lord Chancellor, (Lord King,) made the order with some reluctance. (*c*)

A *subpœna* for costs, however, or a writ of execution, issues only against persons who are parties to the record, (*d*) therefore, where costs are to be recovered against a person who is not a party to the record, the course of proceeding, as stated by Lord Eldon, is, first to get an order *nisi* upon him to pay by a given day; and, if he does not pay by the day named, an order may be obtained that he may pay by another day, or stand committed. (*e*)

It may be useful to notice, in this place, a recent case, (*f*) where a client had taxed his solicitor's bill, under the common order, and a balance had been found due from the client. A doubt having arisen as to the mode of proceeding to compel payment of the balance, viz: whether it was not necessary for the solicitor, before he applied for the four-day order, to obtain an order fixing a day for payment, a certificate was returned to the Court, by one of the Registrars, in these terms: "The solicitor must first demand payment of the money found due from his client; and, if it is refused, he must apply to the Court for the four-day order, which will be granted on producing an affidavit of the demand and refusal, *and of the service of the notice of motion.* (*g*) The four-day order is then served upon the client, and demand again made, and, upon refusal, an order for commitment is granted, without notice; but an affidavit of service of the four-day order, and of the demand and refusal, is produced to the Registrar."

Besides the ancient method of recovering costs by *subpœna* or *writ of execu-*
[*95] *tion*, the Act for the Abolition of Imprisonment *for Debt on *Mesne Process*, (*h*) has provided an additional remedy by writs of *fieri facias*, and *venditioni exponas*, and of *elegit*, by which costs either alone, or together with a sum of money decreed or ordered to be paid by one party to another, may be recovered from the personal or real estate of the party to pay them. (*i*)

The method of carrying the provisions of this act into effect, has been pointed out by the orders of the 10th of May, 1839, (*k*) in the appendix to which orders will be found the proper form of writs adapted to cases of costs, whether payable alone or together with a sum of money or of a sum of money with interest.

It is to be recollected, that, in any of the above cases, it is necessary that the order or decree under which the costs are to be paid, should be duly passed and entered in the manner already pointed out, (*l*) at least one month before a writ of *elegit* or of *fieri facias* can be sued out upon it, and that the date of such entry must be marked upon the order. (*m*)

(*c*) Staines v. Maddox, Mos. 319. (*d*) Anon. 14 Ves. 207.

(*e*) Ibid. This does not appear to be an accurate statement of the course of proceeding, which is very clearly laid down by Mr. Smith in his treatise, vol. 1, p. 455.

(*f*) Stocken v. Dawson, 7 Sim. 547.

(*g*) *Vide In re* Partington, Mad. & Geld. 71.

(*h*) 1 & 2 Vict. c. 110—By this act, s. 13, (rendered applicable to decrees and orders by Courts of Equity by sect. 18,) costs may be made a direct charge upon the real estates of the party to pay them in the manner there pointed out. *Vide ante*, vol. 2, 694, 695.

(*i*) *Vide ante*, vol. 2, C. XXIV. S. 6, p. 689.

(*k*) 1 Beavan, XII.; *ante*, vol. 2, C. XXIV. S. VII. p. 698.

(*l*) *Ante*, vol. 2, p. 678. (*m*) Vol. 2, p. 700.

The costs also must be taxed by the Master, and the Master's certificate of such taxation filed, and a copy thereof produced to the Clerk in Court issuing the writ together with the decree or order directing the payment.

The above methods of procuring the payment of costs apply, only, where costs are payable from one party to another; where they are payable out of the fund or estate which is the subject of dispute, the proper course, where the fund is standing in the name of the Accountant General, is for the party having the carriage of the order to leave the same, together with an office copy of the Master's report or certificate with the *Clerk of the Accountant General in whose division the fund is placed, who will prepare a [*96] check upon the Bank of England for the amount. The check is then passed through the offices and taken to the Bank of England, in the same manner as checks for the payment of money out of Court in other cases. (*n*)

Where the costs are to be paid out of a fund not in Court, or out of the estate which is the subject of litigation, no *subpœna* lies against the party in whose hands the property is, or in whom the estate is vested, but a sufficient proportion of the fund or estate will be ordered to be sold. (*o*) A direction to this effect, where none is contained in the decree, may be obtained by motion. (*p*) It is usual, however, to insert the order for a sale of the estate, for the purpose of paying the costs, in the decree or order itself, and an omission to do so may be a ground for a rehearing or appeal. (*q*) It has been already mentioned, that, where a tenant for life of an estate is entitled to costs out of the estate, the Court will direct an immediate sale to raise the costs. (*qq*)

It has been before stated, that where, after a bill has been dismissed for want of prosecution, the plaintiff files another bill for the same purpose, the Court will suspend the proceedings on the new bill, till the costs of the former suit have been paid, and, that it will even do so where the defendant in the second suit is executor of the defendant in the first suit; (*r*) the same course will also be allowed by the Court where the original bill has been dismissed at *the hearing*, without prejudice to the plaintiff's filing a new bill for the same matter. (*s*) It seems, however, that the Court will not make such an order if the defendant takes any step in the new cause before applying for it. (*t*)

(*n*) 2 Smith, 457.
(*o*) Cannon v. Beely, 1 Dick. 115, and *vide* Cannell v. Beeby, S. C. Beames on Costs, Appx. 7.
(*p*) Cannell v. Beeby, *ubi supra*.
(*q*) *Vide* Burkett v. Spray, 1 R. & M. 113.
(*qq*) *Ante*, p. 73.
(*r*) *Ante*, vol. 2, 383.
(*s*) Onge v. Truelock, 2 Moll. 41.
(*t*) Ibid.

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*CHAPTER XXVIII.

OF REHEARINGS AND APPEALS.

SECT. I.—*General Rules.*

WHERE a party feels himself aggrieved by a decree or a decretal order of the Court, there are three modes by which he may have it either reversed or altered, viz: 1. By a Rehearing before the same or another Judge of the Court; 2. By an Appeal to the House of Lords; and, 3. By a Bill of Review. The two first will be discussed on the present occasion, the third will be reserved as the subject of a future chapter. (*a*)

As a rehearing, by the Lord Chancellor, of a decree or order made by the Master of the Rolls or Vice Chancellor, is in fact an appeal; and, as many of the rules applicable to appeals to the House of Lords, are applicable to those proceedings in common with rehearings before the Lord Chancellor, the present section will be devoted to the consideration of those rules and principles which are common to both proceedings; and it is to be premised, that, as the term "*appeal*" may be applied to both, it will, where used in the following pages, include rehearings in Chancery as well as appeals to the House of Lords, except in those instances in which the distinction shall be specifically pointed out.

It is to be recollected, that, except in the instances already pointed out, a decree or order made by consent of counsel, cannot be the subject of appeal; (*b*) and it is to be observed, that for this purpose, an order, made at the hearing, for the cause to stand over, with liberty to the plaintiff to add parties, is con-

[*98] sidered as an order made by consent, and cannot be appealed *from; for "in truth the want of parties is in its nature a reason for dismissing the plaintiff's bill, and it was a matter of relaxation, on the part of the Court, when it permitted the cause to stand over." If the plaintiff is dissatisfied with the opinion of the Court, as to the want of parties, he should let the bill be dismissed, and then appeal from the order of dismissal. (*c*)

This rule, however, does not apply to cases in which, upon a demurrer for want of parties, the demurrer is allowed, with liberty to the plaintiff to amend: in such cases, the plaintiff, by acquiescing in the undertaking to amend, does not preclude his right of appeal. (*d*)

It seems that a party dissatisfied with a decree, will not prejudice his right to appeal, or have the cause reheard, by consenting to an order consequential upon the decree; (*e*) indeed, the general rule of the Court being that an appeal or a rehearing does not suspend the proceedings under a decree, it would be absurd to say that, if a party, in order to save the expense of a contest upon a point which, supposing the decree to stand, he could not sustain, should obey the decree, by consenting to an order consequential upon it, he is by such obedience to be deprived of his right to have the case reheard.

Where an agreement had been signed by the parties, and by consent made an order of the Court, to submit to such decree as the Court should make, pro-

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(*a*) *Vide* Bills of Review, &c. *post.*
(*b*) *Vide ante*, vol. 2, 617.
(*c*) Beresford v. Adair, 2 Cox, 156.
(*d*) Ledbetter v. Long, 4 M. & C. 286.
(*e*) Wood v. Griffith, 1 Mer. 35.

vided it should be on the merits, and not on any mistake in the pleadings, and that neither party should bring an appeal, notwithstanding which, one party petitioned for and obtained, from Lord King, an order for a rehearing; Lord Talbot, although he expressed doubts whether, if the agreement had been disclosed to the Court originally, the order for a rehearing would have been made, yet as his predecessor, who heard the cause, had ordered a rehearing, and thereby shewn he was not satisfied with the decree, he refused to discharge it. (*f*)

*It is not necessary, that the person who appeals should be actually a party to the record, provided he has an interest in the question [*99] which may be affected by the decree or order appealed from; even creditors coming in before the Master, under a decree, have been held entitled to rehear the cause, though not parties to the bill, because the decree affected their interest. (*g*) "In *Hungerford's Case*, (*h*) the creditors complained, that the property had not been applied as it ought; and it was objected, that they could not come in under the decree, and impeach the decree; and it was answered that they might, for, if the decree contained in itself a wrong disposition of the property, they, coming in as creditors, had a right to appeal, because the decree bound their rights. In *Osborne* v. *Usher*, (*i*) the same principle is admitted, and it is held, that if the right of a remainder-man, or of any person entitled to the estate in any way, is bound by the decree, he must have a right to appeal from it, as well as the person against whom it was made." (*k*) Upon this ground, it has been determined, that a tenant in tail in remainder expectant, after the determination of a prior estate tail, (who would not be a necessary party to a suit affecting the entailed estate, against the prior tenant in tail,) has a right to appeal against the decree in that suit; and that he may file a supplemental bill, for the purpose of making himself a party to the suit, in order to appeal from it. (*l*)

It has also been determined, by the House of Lords, that a purchaser under a decree, though no party to the suit, may appeal from an order setting aside a bidding, and ordering a new sale before the Master; (*m*) and it has been held, that a creditor coming in before a Master, and having his claim disallowed on exceptions to the report, may appeal from the order disallowing the exceptions. (*n*)

It is to be observed, however, that it is only in cases in *which [*100] the interest of the party wishing to appeal will be bound by it, that a rehearing or appeal will be permitted, at the instance of an individual not on the record; in no other case can he have ground to complain of the decree or order. (*o*)

A party who is poor, is entitled to prosecute or defend an appeal or a rehearing, *in formâ pauperis*, in the same manner that he has a right to sue and be sued in that character. (*p*)

In the House of Lords, a poor party, whether appellant or respondent, may be admitted *in formâ pauperis*. To obtain such admission, the pauper must present a petition, accompanied by an affidavit of his poverty, and also a certifi-

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(*f*) Buck v. Fawcett, 3 P. Wms. 242.
(*g*) Giffard v. Hort, 1 Sch. & Lef. 409.
(*h*) Cited ib.
(*i*) 6 Bro. P. C. ed. Toml. 20.
(*k*) Giffard v. Hort, *ubi supra*.
(*l*) Ibid. p. 411; *sed vide* Osborne v. Usher, *ubi supra*; where such an appeal was sustained, although it does not appear that any supplemental bill was filed.
(*m*) Ryder v. Earl Gower, 6 Bro. P. C. 306.
(*n*) Winchilsea v. Garetty, 1 M. & K. 253.
(*o*) Winchilsea v. Garetty, 1 M. & K. 253.
(*p*) Bland v. Lamb, 2 J. & W. 402; *ante* vol. 1, 43.

cate to the same effect from the minister and churchwardens of the parish where the party is resident.

If the pauper be in London, no affidavit in writing, or certificate, will be necessary; as, in that case, the party makes oath of his or her poverty in person, at the Bar of the House. (*q*)

The grounds upon which a party may appeal from a decree or order of the Court, or have it reheard, are as numerous and various as the cases themselves, and any attempt at pointing them out would be hopeless. In fact, wherever the Court is called upon to determine a question of law or of fact, the decision may be the subject of a rehearing or appeal, by any party who considers himself aggrieved by it. The only case, in which a party cannot appeal from the decision of the Court, is where the determination complained of, is merely the result of the exercise of discretion on the part of the Judge, in a case where the matter was fairly a subject for the exercise of discretion; in such cases, the practice of the Court will not allow an appeal from the discretion of one Judge to that of another. Upon this ground, it is, that the Courts have adopted the rule, that there can be no rehearing or appeal upon the question of costs.

[*101] *The foundation of this rule is clearly stated by Lord Hardwicke, in *Owen* v. *Griffith*, (*r*) viz: "To prevent vexation and trouble; for as cases in equity often depend on abundance of circumstances, about which, as the reason of mankind might differ, it would (*i. e.* if the question of costs might be laid open generally) create perpetual appeals." The operation of the rule, however, is strictly confined to cases in which costs are to be paid by one party to another, and do not form any part of the relief sought by the bill, and it is liable to exception, where the costs are payable out of a fund, or are chargeable upon an estate, or are part of the relief to which a party is entitled, and the facts of the case distinctly appear upon the face of the proceedings themselves; so that it is not necessary, in determining the question of costs, upon the appeal, to enter into any investigation of the merits. (*rr*) Upon this ground, in the case of *Owen* v. *Griffith*, (*ss*) above cited, Lord Hardwicke entertained an appeal by an incumbrancer, who had brought his bill to compel the payment of his charge, out of an estate which he had extended by *elegit* upon a judgment, and to whom the Judge below had refused his costs, although he had given him his principal and interest; his Lordship holding, that an incumbrancer upon an estate for a just debt has a lien upon the estate for his costs, as well as his demand; and that, therefore, the appeal, although for costs, affected the merits of the case. (*s*)

The same distinction was recognized by Lord Keeper Northington, in *Cooper* v. *Scott*, (*t*) and by Lord Eldon, in *Jenour* v. *Jenour*. (*u*) In that case, the question arose upon the interest of the parties in a trust fund, which had been

[*102] separated from *the general residue, and the bill prayed, that the costs of the suit might be paid out of the general estate; upon the

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(*q*) Palmer's Prac. H. L. 84.

(*r*) 1 Ves. 250; Amb. 520, S. C.; *vide* Wirdman v. Kent, 1 Bro. C. C. 140; 2 Dick. 594; Williams v. Begnon, cited ib.; and Beames on Costs, (ed. 1840,) Appx. 10. It is to be noticed, that a case, in Moseley, p. 395, Gould v. Granger, which, from the statement of it there, appears to be at variance with the rule laid down, is incorrectly reported; the question having been, not as to the costs of the cause, but as to the costs of the conveyance of the estate; *vide* Beames on Costs, Appx. No. 12; and Angell v. Davis, 4 M. & C. 363.

(*rr*) Angell v. Davis, 4 M. & C. 360. (*ss*) *Ubi supra.*

(*s*) *Vide* Lord Cottenham's judgment in Angell v. Davis, 4 M. & C. 363.

(*t*) 1 Eden. 17; 1 Bro. C. C. 141 n. (*u*) 10 Ves. 562.

hearing, the costs were ordered to be paid out of the general estate; but on an appeal, although the decree of the Master of the Rolls, upon the right to the fund, was affirmed, Lord Eldon corrected the decree, as to costs, by directing them to be paid out of the particular fund, and not out of the general estate; (*x*) holding, that the costs were not within the common rule.

So, in *Taylor* v. *Popham*, (*y*) Lord Eldon states the rule to be, that where the costs are disposed of, as subjects of relief, though they are the subject of appeal, it is not an appeal for costs. In that case, a creditor had a contingent lien upon a particular fund, which had been appropriated to answer it, and an order of Lord Erskine had given, to the solicitors in the cause, a lien for their costs, upon the fund generally;—the question on the appeal was, whether they should have those costs out of the appropriated fund, in preference to the party having the contingent claim upon it; and Lord Eldon's observation upon the question is, "It is quite competent to rehear or appeal upon such a point respecting costs as this; the Court having given costs, has applied the fund of the party to a payment to which it ought not to have been applied."

The same distinction was acted upon by Lord Lyndhurst in *Bushett* v. *Spray*, (*z*) and has been much considered and approved of by Lord Cottenham in *Taylor* v. *Southgate* (*a*) *Marsden* v. *Eyre*, (*b*) and in *Angell* v. *Davies*; (*c*) in the last of which cases, his Lordship founds his judgment upon three very important circumstances which appeared in the case, any of which, his Lordship held, would have been sufficient to sustain the appeal:—1st, the bill prayed that the defendant might restore the property in question, and pay the costs, asking the payment of the costs, by way of special relief; 2nd, the case was one, in which the proceedings themselves, without going into the details of the transaction, furnished all the information necessary for the purpose of determining the question; and *3dly, it was not one of personal costs, in which the Court had ordered one party to pay them, but a case in [*103] which the Court had directed them to be paid out of a particular fund.

In a more recent case, Lord Cottenham held, that as a party interested in a fund, might appeal from a decree directing costs to be paid out of that fund; so parties personally ordered to pay costs, might appeal from the decree, on the ground that the costs ought to be paid out of the fund. (*e*) The case alluded to was an appeal from a decree by the Vice Chancellor, with regard to the right to a certain fund in Court, which was claimed by a married woman against her husband, as property settled to her separate use; the Vice Chancellor held, that the fund belonged to the wife, and ordered the costs of the suit to be paid by the husband and two individuals who were trustees of the settlement. From this decision, two petitions for a rehearing were presented, one by the husband, and the other by the trustees. It was objected, at the rehearing, that the petition of the trustees, being in effect merely an appeal for costs, could not be proceeded with; but Lord Cottenham held, that an appeal for costs, under such circumstances, might be sustained, and allowed the argument to go on.

Another exception to the general rule as to costs is afforded by a case (*f*) in the House of Lords, which, although made upon the hearing of an appeal from the Court of Session in Scotland, may be cited as applicable to all cases, English as well as Scotch. In that case, it was held, that though an appeal for costs only will not lie, when costs are in the discretion of the Court; yet where the Court is directed, by an act of Parliament, to give costs, it is a proper subject of appeal, if they are not given according to the requisition of the act.

(*x*) *Vide ante*, p. 70.
(*z*) 1 R. & M. 113.
(*b*) Ibid. 231.
(*e*) Bagot v. Bagot, L. C. July, 1840, MSS.
(*y*) 15 Ves. 72.
(*a*) 4 M. & C. 203.
(*c*) Ibid. 360.
(*f*) Tod v. Tod, 1 Bligh, N. S. 639.

The above form the only exceptions which have as yet been acknowledged, to what may be considered as the general rule of the Court, that there can be no rehearing or appeal for costs, a rule which is very strictly adhered to; so much so, that the Court will not permit it to be evaded, by coupling the appeal for costs with another ground of appeal, *which is unfounded, for the mere purpose of giving colour to the appeal for costs. Thus, where a rehearing was on the ground, that a defendant, charged by the decree with the payment of a sum of money, ought also to have been charged with interest and costs, the Court was of opinion, that the decree was correct as to interest, which ought not to have been given; it was thought also, that the decree was wrong in not charging the defendant with the costs, nevertheless the decree was affirmed. "They did not think the claim of interest was frivolous; but, as it was unfounded, the costs were the only thing in question ultimately." (*g*)

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It must not, however, be assumed, from the case last quoted, that, in all cases where the appeal for costs is coupled with other grounds of appeal, the Court will, if it affirms the decree upon the other grounds, refuse to interfere upon the question of costs, if it considers the decision below upon that point to have been wrong; on the contrary, many cases have occurred in which decrees have been varied as to costs, though affirmed on every other point. (*i*) The rule, as to this, is very distinctly laid down by Lord Lyndhurst in *Attorney General* v. *Butcher:* (*k*) his Lordship says—"If a party appeals, having a substantial ground of appeal and a fair question to agitate, and brings in the question of costs along with it, he may succeed with respect to the costs, though he does not succeed in the substantial ground of appeal; but if a point is brought forward as a ground of appeal, which, on the slightest consideration, appears to have no substance, it would be too much to vary the decree as to costs. *A point is not to be put forward as a ground of appeal merely for the purpose of covering an appeal on the question of costs.*"

It may be mentioned here, that a party cannot be allowed to appeal *piecemeal, i. e.* he cannot appeal from part of a decree by one petition, and afterwards appeal from another part, by another petition. The rule is, that if a party appeals *from a part of a decree, he admits the remainder to be correct; (*l*) therefore, where a decree was made by the Court of Exchequer in Ireland upon a bill by a lay impropriator for an account of tithes, and the defendant appealed to the House of Lords against so much of the decree as related to part of the lands made subject to the account, the result of which was that the decree was reversed, as to that part, upon the ground that the plaintiff had not proved his title; upon the defendants presenting a new petition of appeal against the remainder of the decree, it was held that the second appeal could not be maintained. (*m*)

[*105]

It is an established rule, that an order for a rehearing or an appeal, does not stop the proceedings under the decree, or order appealed from, without special order of the Court; (*n*) therefore, if a bill is dismissed with costs, the defendant may, notwithstanding an appeal, proceed to recover his costs. (*o*)

(*g*) Williams v. Begnon, Beames on Costs, Appx. No. 10; *vide etiam* Wirdman v. Kent, 1 Bro. C. C. 140, S. P.

(*i*) *Vide* Jenour v. Jenour, 10 Ves. 662; Squire v. Pershall, 2 Bro. P. C. 396; Pitt v. Page, 1 Bro. P. C. 1; Wekett v. Raby, 2 Bro. P. C. 386; Maguire v. Maddin, ib. 393.

(*k*) 4 Russ. 181.

(*l*) Norbury v. Meade, 3 Bligh, 261.

(*m*) Ibid.

(*n*) Beames's Ord. 265; *vide* Gwynn v. Lethbridge, 14 Ves. 585; Waldo v. Caley, 16 Ves. 206; Willan v. Willan, ib. 216.

(*o*) Tyson v. Cox, 3 Mad. 278; Dunster v. Mitford, cited ibid.

So also, it has been held, that the circumstance of an appeal depending, is not a reason against the plaintiff filing a supplemental bill for the purpose of carrying it into effect; and where the plaintiff filed such a supplemental bill, apprehending that he had not sufficient parties before the Court, and the defendant demurred, alleging as a ground that the appeal was not determined, the demurrer was over-ruled. (*p*)

The Court, however, will, in some cases, upon special application, suspend the proceedings under a decree or order pending a rehearing or appeal; thus it has been held, that although a party may proceed by *subpœna*, to recover his costs, the Court will, when the appeal is lodged, before any step taken, if the *subpœna* for costs has not issued, order the proceedings upon it to be suspended. (*q*)

The Courts, however, are very unwilling to suspend the *execution of decrees, and will not do so except in cases where there is [*106] danger of the object of the appeal being defeated, before the appeal can be heard. Where that is the case, the Court will suspend the execution of a decree or order pending an appeal; thus where the object of a demurrer is to take the opinion of the Court upon the liability of a party to make the discovery required by the bill, the Court will suspend proceedings to enforce an answer pending the appeal from an order over-ruling the demurrer. (*r*)

So also, where there would be danger of irreparable mischief. (*s*) In cases of injunctions, for instance, and still more in orders dissolving injunctions, an appeal ought almost always to be permitted to stay execution; (*t*) upon this ground, likewise, where the Court has directed the sale of property, it will suspend the sale, (*u*) or where property of a perishable nature is ordered to be delivered up, it will direct security to be given for the amount of the property. (*uu*) And so where a specific performance of an agreement for a sale has been decreed, it will suspend the execution of the conveyance till after the appeal, although it will not suspend the other proceedings in the Master's Office. (*x*)

It is, however, only in cases where the mischief of allowing the proceedings to go on will be irreparable, or will defeat the object of the appeal, that it will interfere; and, therefore, although the Court will, as we have seen above, suspend the execution of process to compel an answer, pending an appeal from an order over-ruling a demurrer, the Court will not suspend the execution of an order for the production of documents pending an appeal from that order; because, although by the operation of the order, the evidence afforded by the documents produced will be disclosed, yet, if it is afterwards decided that the evidence ought not to have been produced, it will go for nothing. (*y*)

*So although the effect of an order was to remove a stop placed [*107] on a large sum of money which had been impounded in the Court of Common Pleas, and to enable the defendant to obtain uncontrolled possession of the fund, Lord Brougham refused to suspend the operation of the order till the hearing of the appeal, because the granting of such an order would be in effect deciding the matter the other way. "It would be all which the party opposing had been contending for; it would give him the very stop upon the fund for which he had been in vain struggling, and expose his adversary to the

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(*p*) Woodward v. Woodward, 1 Dick. 33.
(*q*) Roberts v. Totty, 19 Ves. 446; *vide etiam* Meade v. Norbury, 4 Pri. 322.
(*r*) Wood v. Milner, 1 J. & W. 636; the King of Spain v. Machado, 4 Russ. 560.
(*s*) *Vide* Wood v. Griffith, 19 Ves. 550; Way v. Foy, 18 Ves. 452.
(*t*) *Vide* Walburn v. Ingilby, 1 M. & K. 81.
(*u*) Nerot v. Burnand, *ante*, 2 Russ. 56. (*uu*) Ibid.
(*x*) Gwynn v. Lethbridge, 4 Ves. 58. (*y*) Walburn v. Ingilby, 1 M. & K. 61.

delay against which he had been successfully striving; it would be a reversal of a decision, under the form of staying execution." (*z*)

The Court, also, has refused to suspend the distribution of a fund by a trustee for charitable purposes, pending an appeal, unless there is something in the situation of the party to make the distribution, as to pecuniary means, authorizing an inference that if he should thereafter be found to have made a wrong distribution, he would not be able to furnish the means of setting it right. (*a*) So also, where a legacy was ordered to be paid out of Court and the decree was appealed from, the Court allowed it to be paid out, notwithstanding the appeal. (*b*)

Sometimes, however, the Court, assuming the decree to be right, will, although it refuses to suspend the proceedings under it, take precautions to prevent the appeal, in case it should succeed, from being nugatory; thus, in the last case, although it would not restrain the payment of the money out of Court, pursuant to the decree, it required the party receiving it to give security, to be approved of by the Master, for its repayment, if the decree should be reversed. (*c*)

In like manner where a decree was obtained by an equitable mortgagee for the payment of principal, interest, and costs, within a fixed time, in default of which the estate was to be sold, the Court refused to suspend the execution of
[*108] the decree, *but gave six months on the defendant's bringing the money into Court, consenting to a receiver, and paying the interest and costs, the plaintiff undertaking to repay if the decree should be reversed. (*d*)

The Court will never suspend proceedings under the decree, on the ground that, if they are prosecuted, the parties will, if the decree is reversed, be put to unnecessary expense. (*e*) Thus it is not the habit of the Court to suspend the taking of an account in the Master's Office. (*f*) Nor will it suspend the proceedings under a decree directing the specific performance of a contract, at least it will not go further than to direct the execution of the conveyance to be stayed. (*ff*)

Where, however, the decree directs the sale of property, it will sometimes stay the sale, and, if the property consists of personal chattels in the possession of the appellant, it will suspend the proceedings upon the terms of the appellant giving ample security for their value. (*g*)

The proper method of obtaining the suspension of proceedings under a decree or order, pending an appeal or rehearing, is by special motion, which, in the case of a rehearing or appeal in the Court of Chancery must now, under the 46th of Lord Lyndhurst's Orders, (*h*) be made, in the first instance, to the Judge who pronounced the decree or order, (*i*) and not to the superior Court.

It is conceived, however, that this order does not affect the practice in cases of appeals to the House of Lords, and that the party may still, as before, apply
[*109] for a stay of proceedings *against the decree so appealed from, either to that House or to the Court below. (*k*)

(*z*) The King of Spain v. Machado, cited 1 M. & K. 85 n.
(*a*) Waldo v. Caley, *ubi supra*. (*b*) Way v. Foy, 18 Ves. 452.
(*c*) Ibid.
(*d*) Monkhouse v. The Corporation of Bedford, 17 Ves. 380.
(*e*) The appellant, however, upon a petition of rehearing, or his Clerk in Court, is always required to give an undertaking to pay the respondent all such costs as the Court shall award in respect of any proceedings had since the decree or order. Price v. Dewhurst, 4 M. & C. 282. (*f*) Nerot v. Burnand, 2 Russ. 56.
(*ff*) Gwynn v. Lethbridge, 14 Ves. 585. (*g*) Nerot v. Burnand, *ubi supra*.
(*h*) Ord. 1828. Before this order the application could only be made to the Appellate Court. Macnaghten v. Boehm, 1 J. & W. 48; *vide etiam* Huguenin v. Baseley, 15 Ves. 180; Gwynn v. Lethbridge, 14 Ves. 585.
(*i*) It is presumed that the order as well as the one which follows it, applies to the *office* and not to the *person* of the Judge; *vide ante*, vol. 2, 756.
(*k*) *Vide* Huguenin v. Baseley, 15 Ves. 180; and Ord. Dom. Pro. ib. 184.

The costs of a special application of this nature, where it does not succeed, always follow the judgment. (*l*)

If the order appealed against is one which directs the transfer of stock, or payment of money out of Court, and it is wished to prevent the transfer or payment being made pending the appeal, immediate notice of the appeal should be given to the Accountant General, who, upon such notice, will be justified in delaying to comply with the order till there has been time for the appellant to make a special application to the Court, for a stay of proceedings. (*m*)

SECTION II.

Of Rehearings and Appeals in the Court of Chancery.

If a party is dissatisfied with a decree or order which has not been inrolled, the proper course, where it cannot be rectified in the manner already pointed out, (*a*) is to apply, by petition, for a rehearing. This he may do whether the decree or order is made upon the hearing of the cause, or of a demurrer or plea, or upon further directions, or upon exceptions. A decretal order, cannot, in fact, be discharged in any other manner, and where an attempt was made to discharge an order, pronounced by consent upon further directions, by motion, on the ground that the party had been surprised, Lord Thurlow refused to make the order upon motion, although he appeared to think, that, where anything is inserted in a decretal order, as by consent, to which the party has not consented, there must be some way of rectifying it, viz: by bill of review, but that it cannot be done by motion. (*b*)

The same rule, also, prevails where the order is made upon *a petition, (*c*) in which case the proper course is to apply by petition [*110] of rehearing in the same manner as upon a decree or decretal order, the only difference being, that, in case the order appealed from is one made upon petition, the rehearing is usually set down by the Registrar on one of the days appointed for the hearing of cause petitions, and not after the rehearings and appeals already appointed, as in the case of an appeal from a decree. (*d*)

This rule, however, does not apply to cases of orders made upon petition *ex parte* at the Rolls, (*e*) which may be discharged upon motion, either before the Master of the Rolls himself or before the Lord Chancellor, (*f*) amongst which cases it seems that orders obtained *ex parte* by petition at the Rolls for the taxation of solicitors' bills are included. (*g*)

It seems also that an order made upon a petition, presented in a matter under an act of Parliament and not in a cause, may be discharged upon motion, where the application to discharge it is grounded upon irregularity in the petition itself, and is accompanied by an application to take the petition off the file. (*h*)

(*l*) Waldo v. Caley, 16 Ves. 305; Willan v. Willan, ibid. 216.
(*m*) Ferguson v. Tadman, 1 R. & M. 331.
(*a*) Vol. 2, 686. (*b*) Anon. 1 Ves. J. 93.
(*c*) Bishop v. Willis, 2 Ves. 113. (*d*) *Vide* 2 Smith, 37.
(*e*) Lees v. Nuttall, 2 M. & K. 284; Bishop v. Willis, *ubi supra*; Ostle v. Christian, 1 T. & R. 324.
(*f*) Lees v. Nuttall, *ubi supra*; Binsted v. Barefoot, 1 Dick. 112; Barnardiston v. Gibbon, cited 2 M. & K. 287.
(*g*) Clutton v. Pardon, 1 T. & R. 301; Eastwood v. Glenton, 2 M. & K. 280.
(*h*) *In re* Dovenbury Hospital, 1 M. & K. 279.

Orders made upon motion are not proper subjects for a rehearing, but may be varied or discharged, upon application by motion either to the Judge who made the order, or to the Lord Chancellor. (*i*) It is to be observed, however, that a decretal order made on motion, such as an order in a foreclosure suit under the statute, cannot be discharged on motion. (*k*)

We have seen before, (*l*) that decrees upon bills taken *pro confesso* may be reheard, and that, where a defendant has made default at the hearing, and a decree, *nisi*, has been thereupon *made and confirmed, or altered upon shewing cause, (*m*) such decree may also be the subject of a rehearing by way of appeal.

[*111]

A rehearing ought never to be applied for where the defect, in the decree or order, is one which can be remedied by any of the methods before pointed out, and it is to be observed, that, as it will not be permitted after inrolment, so it cannot be obtained till the decree or order has been passed and entered. Thus, in *Robinson* v. *Taylor*, (*n*) the Court refused to allow a cause to be re-argued upon a petition to alter the minutes, and the same rule was laid down, by Lord Eldon, in *Taylor* v. *Popham*, (*o*) where an application was made to rehear a cause, heard by Lord Erskine, whilst the decree was in minutes.

It frequently happens that, upon the hearing of a cause upon further directions, doubts may exist as to the right to a legacy or other sum of money, *primâ facie* payable to an individual, but which the parties claiming are not, at the time, in a situation to discuss; in such cases the practice is to carry over the amount of the legacy or money in the Accountant General's books to the account of the individual having the *primâ facie* right, with directions, however, that it shall not be paid over to him without notice to the party setting up the adverse claim. In such cases, the proper course is, for the party claiming in opposition to the *primâ facie* right, not to apply for a rehearing, but he should present a petition to have the money out of Court, and serve it upon the party in whose name the money is standing. (*p*)

A rehearing can only take place for the purpose of altering the decree upon grounds which existed at the time when the decree was pronounced. Where, therefore, the object is not to correct the decree, but to remedy a grievance consequent upon it, resulting from circumstances *ex post facto*, and not making part of the case, as it originally stood, a rehearing will not be permitted. (*q*)

[*112]

*A cause heard before the Lord Chancellor, may be reheard before the Lord Chancellor or his successor in office. (*r*)

If it has been heard before either of the other Judges, it may, either, be reheard before the Judge who heard it, or before the Lord Chancellor, in which case it is generally termed an appeal, although, in fact, it is only a rehearing.

The Master of the Rolls, cannot rehear a decree or order of the Lord Chancellor, unless specially authorized so to do, (*s*) nor of the Vice Chancellor, for

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(*i*) If a motion is refused without costs the proper course is to give a fresh notice of motion and to make it again before the Lord Chancellor.

(*k*) Cadle v. Fowle, 1 Bro. C. C. 515.
(*l*) *Ante*, vol. 1, p. 697.
(*m*) *Ante*, vol. 2, p. 650.
(*n*) 1 Ves. J. 44.
(*o*) 15 Ves. 72.
(*p*) Barksdale v. Abbott, 3 Russ. 186.
(*q*) Bowyer v. Bright, 13 Price, 316.
(*r*) Taylor v. Popham, 15 Ves. 72.

(*s*) It has been said that you may move, before the Master of the Rolls, to discharge an order, made by the Lord Chancellor *ex parte*, because, only one side being heard, it is a continuance of the same motion. Davy v. Sayes, Mos. 72. It seems, however, that this is only in consequence of a special authority, introduced into the order, the practice of the

that would be, in effect, to rehear a decision of the Lord Chancellor, whose deputy the Vice Chancellor is; and it has been held that the Master of the Rolls has no authority to discharge or alter an order made by the Vice Chancellor, even though made *ex parte*. (*t*)

By the statute, creating the office of Vice Chancellor, (*u*) it is provided, "that such Vice Chancellor shall have no power or authority to discharge or reverse any decree, order, act, matter, or thing, made or done by any Lord Chancellor, Lord Keeper, or Lord Commissioners for the custody of the Great Seal, unless authorized by the Lord Chancellor, Lord Keeper, or Lords Commissioners, for the time being, so to do; nor any power or authority to discharge, reverse, or alter any decree, order, act, matter, or thing, made or done by the Master of the Rolls." The consequence is that no rehearing can take place before the Vice Chancellor of any decree or order made by the Lord Chancellor, unless under a special authority, nor can the Vice Chancellor rehear any matter in which an order or decree has been made by the Master of the Rolls.

*The Court seldom allows more than one rehearing, whether the second hearing was before the Judge who heard the cause originally, or before the Lord Chancellor by way of appeal. It must not, however, be understood, that the power of the Court to direct a rehearing before inrolment is limited to one only, the practice of doing so is only a general, not an inflexible rule; (*y*) and there are many cases in the books in which it has been departed from. (*z*) The point was much considered in *Fox* v. *Mackreth*, (*a*) which had been reheard before Lord Thurlow, upon appeal from the Rolls, when, his Lordship having confirmed the decree at the Rolls, a petition was afterwards presented for a second rehearing, which his Lordship refused to allow. It does not appear, however, from the report of the case by Mr. Cox, that the second petition for a rehearing was rejected, because such a proceeding could not be permitted by the Court; but it had been contended at the bar, that the party was entitled to it as a matter of right; and Lord Thurlow expressed his opinion to be, that, on looking into the cases cited in support of the petition, they did not prove that the practice of the Court was to rehear a rehearing. In *Howel* v. *Howel*, (*b*) Lord Camden again reheard a cause which had been already reheard on appeal from the Rolls; but, in the *East India Company* v. *Boddam*, (*c*) Lord Erskine refused to entertain such a rehearing. It is, however, to be observed, that in doing so, his Lordship admitted that the question of permitting a second rehearing was one for the discretion of the Judge who heard the appeal; and, that his Lordship refused it, on the ground that, not being the Judge who heard the first appeal, (*d*) he had not the means of exercising that discretion, without hearing the case, for [*113]

Court being, that, where there is an *ex parte* application to the Lord Chancellor to introduce into the order, made in such cases, a provision that the other party shall be at liberty to apply to one of the other Judges of the Court to vary or discharge it. George v. Watmouth, Law, J. 1835. Chan. 61.

(*t*) Shirley v. Earl Ferrars, Law, J. 1836, 200; *vide etiam* George v. Watmouth, *ubi supra*.

(*u*) 53 Geo. 3, c. 24.

(*y*) *Per* Lord Eldon, Waldo v. Caley, 16 Ves. 214; *vide etiam* For. Rom. 183.

(*z*) *Vide* Noel v. Robinson, 1 Vern. 90; Lady Falkland v. Lord Cheney, 5 Bro. P. C. 476; Parker v. Dee, 2 Ch. Ca. 200; Eyton v. Eyton, 4 Bro. P. C. 149; all which cases are cited in Mr. Hargrave's argument, in Fox v. Mackreth, 1 Harg. Jur. Arg. 351; *vide etiam* 2 R. & M. 703, in which all the subsequent cases on the subject, are collected and referred to.

(*a*) 2 Cox, 159.

(*b*) 1 Dick. 426.

(*c*) 13 Ves. 421.

(*d*) It was heard by Lord Eldon.

[*114] the purpose of deciding whether he should properly exercise his *discretion by admitting the rehearing. But, whatever may be the rule of the Court, with regard to two rehearings by the Lord Chancellor, cases are not wanting in which the Court has allowed a cause heard and reheard at the Rolls, to be reheard again before the Lord Chancellor: *Pickering* v. *Lord Stamford* (*e*) was heard and reheard at the Rolls, and yet a second rehearing was permitted before the Lord Chancellor. In that case, it is true, the party at the first rehearing was successful, and the second rehearing was applied for by a different party. But in *Brown* v. *Higgs*, (*f*) Lord Eldon entertained the rehearing, though the case had been reheard at the Rolls, at the instance of the same party; and, in *Blackburn* v. *Jepson*, (*g*) a similar proceeding was sanctioned by the same learned Judge. Indeed, when it is considered that, in order to render a decree at the Rolls an efficient decree of the Court by inrolment, it is necessary to obtain to it the signature of the Lord Chancellor, a rule, that the Lord Chancellor cannot rehear the case, because it has been already reheard at the Rolls, would be, in effect, to make the Lord Chancellor a mere ministerial officer, obliging him to affix his signature to a decree of an inferior Judge, whether he approves of it or not, a thing which, in *Brown* v. *Higgs*, (*h*) Lord Eldon refused to do. In that case, his Lordship said, that the appeal called for his judgment, and that he would not consent that the judgment below should go to the House of Lords, as affirmed by him, without hearing the argument upon it. (*i*)

It may be stated, therefore, as the rule of the Court, that there is no positive [*115] restriction with regard to the number of *rehearings; that the granting or refusing of a rehearing is in the discretion of the Court; (*k*) but that, according to the general course of practice, one rehearing of a case, where the application has been sanctioned by the signature of two counsel, in the manner required by the rules of the Court, whether before the Judge who heard it or before the superior Judge of the Court, is merely a matter of course, the Court giving such credit to the opinion of the counsel who sign the petition that the cause ought to be reheard, as to order it to be set down; (*l*) this, however, is not the case, after a cause has been already reheard before the appellate tribunal; in such case, a second rehearing will not be permitted, unless the appellate Judge who heard it, shall, in his discretion, think it a proper case for a second rehearing. (*m*)

This point was fully argued, in *Deerhurst* v. *the Duke of St Albans*, (*n*) in which all the cases on the subject were cited and considered, before Lord Brougham, C., who, on that occasion, had the assistance of the Master of the Rolls, (Sir J. Leach,) and of the Vice Chancellor, (Sir L. Shadwell;) and the

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(*e*) 2 Ves. J. 272, 581; 3 Ves. J. 332, 492.

(*f*) 8 Ves. 561. It appears to have been supposed, that although the Lord Chancellor, in this case, entertained the appeal, after the rehearing at the Rolls, he laid down a different rule with regard to future cases; *vide* Mackintosh v. Townsend, 16 Ves. 330, 331. It appears, however, from the report, that all his Lordship said, was, that if it should be thought right to prevent this in future, it would be much better done, by some rule of practice, to regulate all cases in future, than by his taking upon himself, in the first instance in which it had occurred in experience, to decline the duty of hearing and considering the case.

(*g*) 2 V. & B. 359; *vide etiam* Omerod v. Hardman, 5 Ves. 722.

(*h*) *Ubi supra.*

(*i*) *Vide* the judgment of Sir J. Leach, M. R., in Deerhurst v. the Duke of St. Albans, 2 R. & M. 706.

(*k*) Mills v. Banks, 3 P. Wms. 8.

(*l*) Cunyngham v. Cunyngham, Amb. 89, 91; Atty. Genl. v. Brooke, 18 Ves. 325.

(*m*) East India Company v. Boddam, 13 Ves. 421.

(*n*) 2 R. & M. 702.

rule was established, that, after a cause has been decided in the Court below, and once reheard by the Lord Chancellor, a second rehearing is not a matter of right, but a matter of indulgence, which the Court will only grant, on a special case made.

In a subsequent case, before Lord Brougham, (*o*) a distinction appears to have been attempted, between a rehearing before the Lord Chancellor, where the decree below has been reversed. In that case, Lord Brougham stated his impression to be, that the determination in *Deerhurst* v. *the Duke of St. Albans* (*p*) was not understood as applying to those cases only in which the consecutive judgment was concurrent and not conflicting, and expressed his determination to refuse the application, unless, upon conferring with Lord Lyndhurst, he *should see reason to come to a contrary conclusion: the result [*116] appears to be, that the second rehearing was refused. (*q*) The same result also attended *Mousley* v. *Carr*, (*r*) in which, after a decision of the Master of the Rolls, upon exceptions, had been reversed by the Lord Chancellor on appeal, an application on behalf of another party, to have a second rehearing before the Lords Commissioners of the Great Seal, was refused. In that case, the Lord Commissioner Shadwell, in giving the judgment of the Court, stated it to be the opinion of all the Lords Commissioners, that it was contrary to the practice of the Court to allow a second rehearing before the Great Seal, except under special circumstances, and that an order of Court to that effect would be promulgated. (*s*) No such order has, however, been promulgated, but Lord Cottenham has since declared, that the rule must be considered as peremptory, "that a cause shall not be brought before the Lord Chancellor for a second rehearing, unless leave shall have been previously granted, upon special application, for that purpose." (*t*)

There can be no rehearing of a decree or order of the Court, after it has been inrolled, (*u*) but till inrolment, it is not, as we have seen, a record of the Court, and may be altered upon a rehearing; (*x*) an inrolment, however, by one defendant, of a decree dismissing the plaintiff's bill, will prevent the cause being reheard at the instance of another defendant. (*y*) Where there has been no inrolment, there is no limitation as to the time within which it will be necessary to apply for a rehearing. (*z*) By an old order of the Court, (*a*) it is directed, that when any party shall be dissatisfied with the judgment of the Court, given upon the hearing of any cause, exception, plea, or demurrer, they do, if so advised, petition for a rehearing *of such cause, exception, plea, [*117] or demurrer, within a fortnight after the order pronounced; and if any person shall be advised to appeal from any decree made by his Honor the Master of the Rolls, that such petition be presented, within one month after such decree pronounced. This order, however, has not been followed in practice, (*b*) and a rehearing has, as we have seen, been granted at the distance of two years, on the application of a defendant, of a decree *nisi* made absolute against him, according to the regular practice of the Court. (*c*) The Court has,

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(*o*) Fournier v. Paine, 3 M. & K. 207 n. (*p*) *Ubi supra.*
(*q*) *Vide* 2 R. & M. 708 n (*a*). (*r*) 3 M. & K. 205.
(*s*) Ibid. 208. No such order has been made.
(*t*) Byfield v. Provis, 3 M. & C. 437. (*u*) *Ante*, vol. 2, 674.
(*x*) Ibid. (*y*) Gore v. Purdon, 1 Sch. & Lef. 234.
(*z*) In the Court of Exchequer, no rehearing will be permitted, after the lapse of six months from the time when the order was pronounced; 2 Dowl. Ex. Pr. 235; Bowyer v. Bright, 13 Price, 316; even though the decree was not final, and merely directed accounts, &c.; Townsend v. Champernowne, 1 Young, 344. The rule, however, is capable of relaxation in a proper case; Halford v. Halford, 1 Y. & C. 270.
(*a*) Ord. 25 June, 1724; Beames's Ord. 334.
(*b*) *Vide* Wood v. Griffith, 1 Mer. 35, 36. (*c*) *Vide ante*, vol. 2, p. 650.

also, reheard a cause at the distance of eighteen years from the time the decree complained of was pronounced; (*d*) and has refused to discharge an order for a rehearing, though at the distance of twenty-four years. (*e*)

A rehearing may be obtained, after the decree has been carried into execution; and we have seen that, after the trial of an issue, the Court has permitted a petition for a rehearing of the order directing an issue, to come on for hearing, at the same time as a motion for a new trial of the issue. (*f*) So also, where the Court, by decree, directed the bill to be retained, with liberty to the plaintiff to bring an action, which he did, and failed, the Court permitted the cause to be reheard; although it was objected, that the plaintiff, having acted under the decree himself, by bringing the action, could not be heard to dispute the propriety of it. (*g*)

In *Fournier* v. *Paine*, (*h*) before referred to, a rehearing, by way of appeal from an original decree, appears to have taken place after an appeal from an order made upon exceptions to the report of the Master under the decree. In fact, as long as a decree or order remains uninrolled, it is open to a rehearing; but if a party is desirous of obtaining a rehearing, he should, to prevent disappointment, immediately that it is passed and entered, enter, with the Secretary of decrees, a caveat against its being inrolled; (*i*) and, having done that, he [*118] *must take care to present his petition for a rehearing, within the time limited for that purpose by the practice of the Court; (*k*) as, if he delays it, and the decree is inrolled, he will be too late, unless he can vacate the inrolment upon any of the grounds already pointed out. (*l*)

A petition for a rehearing is intituled in the cause, and if the cause has been heard before the Master of the Rolls, and it is wished to have it heard again before him, it must be addressed to the Master of the Rolls. If the cause was heard by the Vice Chancellor, and it is intended to have it reheard by his Honor, the petition must be addressed to the Lord Chancellor, praying that it may be reheard by the Vice Chancellor. If it has been heard, before either the Master of the Rolls or the Vice Chancellor, and the object is to appeal from his decision, to that of the Lord Chancellor, it must be addressed to the Lord Chancellor, as it must also be, if the case has been originally heard by the Lord Chancellor, and it is wished to have it reheard by his Lordship.

One petition cannot seek the rehearing of orders made in different suits, though the parties in both suits are the same. Thus, where two bills were filed by the same plaintiff, against the same defendant, and the defendant put in a plea to one and a demurrer to the other, which both came on for argument on the same day, and the Vice Chancellor made two separate orders, allowing them with costs; whereupon, the plaintiff presented a petition of appeal, complaining of both the orders, (*m*) Lord Cottenham, considered an objection to the petition, on the ground, that it embraced several orders in separate suits as valid; but, on the plaintiff's counsel electing to treat the appeal as an appeal against the order on demurrer only, and undertaking to amend the petition, by restricting it accordingly, he allowed the argument to proceed.

The petition generally states, shortly, the facts of the case, as they appear in the pleadings; and it is not irregular to set forth in it the grounds insisted upon in the answer, against making the decree. (*n*) It must not, however, state

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(*d*) Mills v. Banks, 3 P. Wms. 2. (*e*) Ibid.
(*f*) White v. Lisle, 3 Swanst. 351; *ante*, vol. 2, 757.
(*g*) Brophy v. Holme, 2 Moll. 1. (*h*) 3 M. & K. 207 n.
(*i*) For the method of preventing the inrolment of decrees, &c., *vide ante*, vol. 2, 681.
(*k*) *Vide ante*, vol. 2, 684. (*l*) Ibid.
(*m*) Boys v. Morgan, 3 M. & C. 661.
(*n*) Wood v. Griffith, 19 Ves. 550.

any matters *which do not appear in the pleadings, or the state- [*119]
ment of which is not warranted by them. (o) Therefore, where in a suit for the administration of the estate of a testator, who described himself, in his will, as of Halifax, in *Nova Scotia*, certain lapsed legacies were distributed, according to the Statute of Distributions (there being no allegation on the record, that the administration ought not to be according to the law of England) a petition of rehearing, which stated, that the testator died, domiciled in *Nova Scotia*, and praying that distribution might be made, according to the law of that country, was dismissed with costs. (p) If any order of the Court has been made since the decree, for the purpose of carrying its provisions into effect, it should be stated; and the circumstance of such an order having been made by consent, will not prejudice the appellant's right to have the cause reheard. (q)

Where the petition is improperly framed, *e. g.*, if it make a different case from that on which the decree was made, or introduce representations which were not made in the Court below, the Court will, on application by motion, order it to be taken off the file, with costs, the deposit to go in part of costs. (r) It seems, however, that it will, on such an occasion, introduce into the order a proviso, that it is to be without prejudice to the appellant's presenting another petition in more regular form. (s)

It is not necessary that a petition for a rehearing should state the reasons why the party presenting it is dissatisfied with the original decree or order; but it usually states, in a general manner, that he is aggrieved by it, or by part of it; and prays that the cause, &c., may be reheard and either that the decree may be reversed, or that it may be altered in such points as are objected to.

In *Giffard* v. *Hort*, (t) Lord Redesdale complains of the inconvenience of the practice of not stating the grounds upon which the rehearing is sought; and there can be no doubt, but that much convenience, would, in many cases, result from *the statement; but the rules of the Court do not require it, [*120]
though they are sometimes inserted.

A certificate must be annexed to every petition for a rehearing, signed by two counsel, certifying, "that they conceive that the cause is proper to be reheard." This is required, in order to guard against the abuse of the right to appeal, by the pledge of counsel, that the case is fit to be reheard. (u)

The counsel who sign the certificate, are usually those who were concerned in the original hearing, or at least one of them; and "such credit is given by the Court, to their opinion that the cause ought to be reheard, that it will, in general, order the cause to be set down," as a matter of course. (x)

But although the general practice is, for the Lord Chancellor to order the cause to be set down for rehearing, as a matter of course, upon the certificate of counsel, he may, if he has any doubt upon the subject, order the petition itself to come on for hearing, before he orders it to be set down. This, as we have already seen, was done by Lord Thurlow, in *Fox* v. *Mackreth*. (y)

The proper course, however, is, where there is any irregularity in the petition, for the party respondent, to make a special application to the Court, by motion, to have the petition taken off the file; to which may be added, if the order for setting down the petition has been made, an application, that the order

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(o) Wood v. Griffith, 19 Ves. 550.
(p) Nevinson v. Stables, 4 Russ. 210.
(q) Wood v. Griffith, *ubi supra*.
(r) Ibid.
(s) Ibid.
(t) 1 Sch. & Lef. 398.
(u) Monkhouse v. the Corporation of Bedford, 17 Ves. 380.
(x) *Per* Lord Hardwicke, in Cunyngham v. Cunyngham, Amb. 91; *vide* Atty. Genl. v. Brooke, 18 Ves. 325; E. I. Company v. Boddam, 13 Ves. 423.
(y) 2 Cox, 159.

may be discharged with costs, which was the course pursued in *Wood* v. *Griffith*. (z)

The certificate annexed to the petition, having been duly signed by counsel, the petition and certificate must be left with the Secretary of the Lord Chancellor, or of the Master of the Rolls, according to the address of the petition. (a)

The *fiat* of the Lord Chancellor, upon this petition, is usually in the following form:—"*Upon the petitioner, or his Clerk in Court, consenting to pay such costs, (if any) as the Court shall think fit to award, in respect of any* [*121] *proceedings had since the said decree (or order,) and upon his depositing £20 (b) with the Registrar, in a week, let this appeal be set down to be heard before me, (his Honor,) next after the rehearings and appeals already appointed.*

The petition having been answered, the undertaking required by the *fiat* to be signed by the petitioner, or his Clerk in Court, must be added to it, and signed accordingly. The object of the Court, in requiring this undertaking, has been recently discussed before the Lord Chancellor; and it appears, that it is intended to provide for the reimbursement to the respondent, of all such expenses as he may be put to, in prosecuting the decree or order appealed against. It was contended, by the counsel for the respondent, that the intention of it is to create a liability, on the part of the party signing it, to all the costs of the appeal, but the Lord Chancellor was of opinion, that the undertaking is required for the purpose above stated; and that it extends and applies only to such costs as may have been incurred in the prosecution of the decree. (c)

[*122] The undertaking having been signed by the petitioner, or *his Clerk in Court, the next step is to obtain from the Registrar, the order for setting down the cause for rehearing. For this purpose, the petition, with the Lord Chancellor's *fiat*, and the undertaking annexed, must be taken to the Registrar, who, upon payment of the deposit, will file the petition, and draw up the order, which must be passed and entered in the usual way.

It is to be observed, that, by the forms of the *fiat*, the deposit is to be paid within a week after the date of the *fiat*. This order must be complied with, but if from any circumstance, over which the appellant has no control, such as

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(z) *Ubi supra*, p. 119; *quod vide*.

(a) At the same time that the original petition is left, a fair copy of it, together with a full copy of the decree or order appealed from, must be also left; 2 Smith, 29.

(b) Under the old orders of the Court, the deposit upon a rehearing or appeal from a decree, was £10, and upon the rehearing of any exceptions, £5, Beames's Ord. 316, 459; but by the orders of 1828, ord. 42, the deposit upon every petition of appeal or rehearing, has been increased to £20, to be paid to the adverse party, where the decree or order appealed from, is not varied in any material point, together with the further taxed costs occasioned by the appeal or rehearing, unless the Court shall otherwise order, *vide* 2 Russell, Appx. 16. But although the order, above referred to, directs a deposit of £20, to be paid on every appeal, the practice of the Registrar's Office confines it to appeals, or rehearings of decrees or orders upon further directions or exceptions. The deposit taken upon an appeal from an order, made upon petition, is still £10. [The author is indebted for this information, to Mr. Latham, of the Registrar's Office, the gentleman to whom the deposits are actually paid.]

(c) Price v. Dewhurst, 4 M. & C. 282. It seems to have been supposed, by the Clerks in Court, that the object of the undertaking is to make the Clerk in Court signing it personally liable; to escape from which the undertaking was usually drawn up in the following form:—"*I consent for the appellant, A. B., as his Clerk in Court.*" But this precaution, it seems, is unnecessary, as the undertaking is not intended to fix the Clerk in Court with any personal liability, and, in fact, according to the ancient forms in the Registrar's Office, the order to set down the rehearing was, formerly, drawn up in the following form:—"*upon the petitioner consenting, &c., to be signified by his Clerk in Court signing the petition.*" *Ex relatione*, E. D. Colville, Registrar.

its being vacation time, or the absense of the Lord Chancellor from London, the Lord Chancellor's Secretary will alter the date of the *fiat*, to meet the emergency of the case. (*d*) If the appellant does not comply with the conditions of the *fiat*, the other party may proceed to inroll the decree; where, however, the delay was occasioned by circumstances over which the appellant had no control, the inrolment was vacated. (*e*)

Where there is an original and supplemental cause, or two supplemental causes, they are considered as one, and the payment of one deposit only is necessary. (*f*)

The order for setting down the cause for rehearing having been passed and entered, must be served upon all the Clerks in Court of the other parties to the suit, at least all those whose interest is affected by the appeal, in the usual way, by delivering a copy to the Clerk in Court to be served, at the same time shewing him the original.

It is to be observed that it is the order for setting down the rehearing or appeal that is served upon the parties and not the petition itself, which is filed with the Registrar, from whom the parties served must obtain copies. (*g*)

It is said that if the order is served so as to give two days' notice of the rehearing it will be sufficient, but it is advisable to serve the order as soon as possible. (*h*)

After a petition for a rehearing or of appeal has been presented [*123] *it may be withdrawn on application by motion, provided it is consented to by the respondent. If not consented to, it cannot be withdrawn but must come on in its course. (*i*)

If, when the rehearing is called on, the appellant does not appear, his petition will, upon reading an affidavit of service of the order for setting it down, be dismissed with costs; and so, if the respondent does not appear the Court will, upon reading a similar affidavit, proceed to hear the appeal, *ex parte*.

Where the appeal is against the whole decree, the cause is, in ordinary cases, actually reheard, that is, the pleadings are opened, and the cause proceeded with exactly as if it were an original hearing; it is, however, in the power of the Court to reverse this order of proceeding and to direct which side shall commence. (*k*) When the appeal is only from a part of the decree, the appellant generally begins, though this arrangement may also be altered at the discretion of the Judges. It is to be observed, that where one only of two defendants appeals against the decree so far as it affects him, it is substantially an appeal against the whole decree, and not a partial appeal, and that the plaintiff is therefore entitled to begin. (*l*)

In an appeal against a judgment allowing a demurrer to the whole bill, the plaintiff is entitled to begin. (*m*)

It is stated that, when the rehearing is of a cause originally heard before the Lord Chancellor, it must be opened as a case, (*n*) and it is presumed that the same regulation applies to any rehearing before a Judge who heard the cause originally.

It is to be observed, that, in the case of a rehearing or appeal, all parties interested in supporting the decree or order appealed from are entitled to be

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(*d*) 2 Smith, 29.
(*e*) *Vide* Richards v. Wood, 2 M. & K. 621; and *ante*, vol. 2, p. 684.
(*f*) Cowper v. Scott, 1 Eden, 17; cited 1 Bro. C. C. 141, Ed. Belt.
(*g*) 1 T. & V. 736. (*h*) Robinson v. Taylor, 1 Ves. J. 45.
(*i*) Thomson v. Thomson, 10 Ves. 30.
(*k*) Alexander v. The Duke of Wellington, 2 R. & M. 35.
(*l*) Lees v. Nuttall, 2 M. & K. 819.
(*m*) Atty. Gen. v. Aspinall, 2 M. & C. 613. (*n*) Anon. 2 Atk. 49.

heard, but that no party, except the appellant, can be heard in support of the appeal. If, therefore, any party, who is not included as a co-petitioner *in a petition of rehearing, is desirous of appealing, he must present a separate petition, (*o*) otherwise he will be precluded from all benefit of the appeal, even though the result of it should be to shew that the decree was completely wrong, as well against him as against the appellant. Thus, where one of several defendants appealed, and an order was made dismissing the bill, upon grounds which were equally applicable to other defendants, who did not join in the appeal, it was held that such other defendants could have no benefit of the order, although it rendered the decree useless. (*p*) It seems, however, that if the result of the appeal had been otherwise, and the appeal had been dismissed or the decree only slightly varied, the defendants who did not appeal, would, if they had been heard in support of the decree, have been entitled to their costs, either to have been paid directly by the defendant who appealed, or by the plaintiff; such costs to be added to the plaintiff's own costs and reimbursed to him by the appellant. (*q*)

[*124]

Sometimes where there is an appeal against a part of a decree, the respondent or some other party may feel himself aggrieved by another part,—in such cases the proper course is to present a cross appeal. Where that has been done, the last appeal may be brought up to be heard at the same time with the first, and one order be made in both. (*r*)

On a rehearing, all depositions taken before the original hearing, though not then made use of, may be read. (*s*) The reason of this is stated by Lord Chancellor Parker, in *Wright* v. *Pilling*, (*t*) to be, that "the appeal is only to give the Chancellor an opportunity of hearing why he should not inroll, as it is to be inrolled as his decree, therefore the cause is entirely open, and the party at liberty to offer what he can against his signing and inrolling the decree." (*u*)

*It seems, however, that if, after the hearing, a witness has been convicted of perjury, the circumstance may be brought before the Court upon a rehearing. (*x*) So also, where a witness, in an answer to a bill exhibited against him since the original hearing, had confessed, that, on the day he was examined, he took a bond from the plaintiff, whereby the plaintiff bound himself, that, if he recovered the estate in question, he would convey part of it to the witness, the answer was allowed to be read at the rehearing to take off the effect of the witness's evidence; (*y*) but it seems that an appellant bringing forward evidence, at the hearing of an appeal, which was not read in the Court below, will not be allowed to read it upon any other terms than those of giving up his deposit. (*z*) This, however, can only be where the omission to read the evidence was through the fault of the appellant; where that has not been the case, as where the evidence was tendered, but rejected, it may, if the Court thinks proper, be read at the rehearing without condition.

[*125]

It is to be noticed, that it is only in cases in which the evidence was capable of being produced at the hearing, that it can be read at a rehearing. No new

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(*o*) 2 Smith, 34.

(*p*) Tasker v. Small, 1 C. P. Cooper's Reports, 255.

(*q*) *Vide* Stocken v. Stocken and Stubbs v. Sargon, cited ib. 257.

(*r*) Blackburn v. Jepson, 2 V. & B. 359.

(*s*) Cunyngham v. Cunyngham, Amb. 90; Nudham v. Smith, 2 Vern. 463; Dashwood v. Lord Bulkeley, 10 Ves. 237; Buckmaster v. Harrop, 13 Ves. 458; Huddleston v. Briscoe, 11 Ves. 587; White v. Fussell, 1 V. & B. 153; Goodyer v. Lake, cited 1 Blunt's Ambler, 90, n. 4.

(*t*) Prec. in Ch. 496.

(*u*) *Vide etiam* Gilbert's Eq. Rep. 151, S. C.

(*x*) Needham v. Smith, 2 Vern. 468.

(*y*) Ibid.

(*z*) Hedges v. Cardonnel, 2 Atk. 408.

evidence can be gone into, (*a*) unless it be that arising from documents, which were omitted to be read at the original hearing, for which purpose, it seems, the Court will, even pending the rehearing, make an order for proving them *vivâ voce, saving just exceptions.* (*b*) In a recent case, (*c*) a party, on special application by motion, obtained an order to prove documents *vivâ voce* on a rehearing, but upon the terms of his paying the costs of the application.

The Court of Exchequer has gone to the extent of giving the party liberty to exhibit interrogatories to prove exhibits, upon an application, supported by affidavit of the plaintiff, that *the exhibits in question have come [*126] to his knowledge since the original hearing, (*cc*) and have permitted the petition of rehearing to be amended for the purpose of stating such discovery. (*d*)

In a more recent case, (*e*) the Vice Chancellor, Sir L. Shadwell, on motion, permitted the plaintiffs, who had, through the inadvertence of counsel, omitted to prove a will of real estate, in consequence of which the bill was dismissed at the original hearing, to exhibit interrogatories for the examination of witnesses to prove the will at the rehearing, which was postponed on the terms of their paying the costs of the application, and the costs of the day, and of the original hearing. It is to be observed, however, that in that case the will was not disputed in the cause, and that the omission arose wholly from the inadvertence of counsel.

It is also to be observed, that, in no case, will the Court permit new evidence to be given, at a rehearing, as to any matter which was not in issue upon the original hearing. (*f*)

It may be noticed, in this place, that, in case of a rehearing or appeal, the whole case is open to the respondent; thus, if the appeal is against the whole decree, it is competent to the Court to modify the decree, by making it more favorable to the respondent; (*g*) therefore, where a plaintiff who had succeeded in obtaining a decision against the defendant, with costs, not being satisfied with the view the Vice Chancellor had taken of the case, had the cause reheard before the Lord Chancellor, in order to obtain an alteration in the decree more favourable to himself, and the Lord Chancellor, upon the rehearing, was of opinion that the plaintiff was not entitled to any relief at all, his Lordship dismissed his bill with costs. In his judgment, his Lordship said, "the plaintiff having thought fit to present a petition of rehearing against the whole decree, the defendants are entitled to raise any question, (and amongst others the question of costs,) which properly arose out of the *subject matter of the [*127] appeal, and I am bound to deal with the cause as if it now came on before me upon the original hearing. (*h*) The result is, the defendants must have their costs of the suit up to and inclusive of the hearing, but I cannot give them their costs of setting the decree right."

So where the appeal is against part of the decree only, the respondent may, if he considers it necessary, go into the whole case and every part of it, whilst,

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(*a*) If new evidence is discovered after the original hearing, the proper course is to obtain leave to file a supplemental bill in the nature of a bill of review, to come on for hearing at the same time with the rehearing of the original decree. *Vide post*, Chap. XXIX.

(*b*) For. Rom. 183; Walker v. Symonds, 4 Aug. 1810, cited 1 Mer. 37, n. (a).

(*c*) Higgins v. Mills, 5 Russ. 287. The author has been informed, by Mr. Colville, that an order to prove exhibits *vivâ voce* at a rehearing, may be obtained on a motion of course.

(*cc*) Williamson v. Hutton, 9 Price, 187; *vide etiam* Williams v. Goodchild, 2 Russ. 92.

(*d*) Wyld v. Ward, 2 Y. & J. 381. (*e*) Hood v. Pimm, 4 Sim. 101.

(*f*) Holt v. Burleigh, Prec. in Ch. 293. (*g*) Sullivan v. Jacob, 1 Moll. 472.

(*h*) Oldham v. Stonehouse, 3 M. & C. 317.

in relation to the appellant, it is only as to the parts complained of in the petition; (*i*) therefore, where there were two questions in the cause, one being whether the executor was entitled to the surplus, and the other whether a legacy given to him by the will was in satisfaction of a debt due to him by the testator, and, upon the first point, the Court decided against him, because he had put in an answer in which he admitted himself accountable for the surplus, but the second point was determined in his favour, whereupon the plaintiff appealed against the last decree; Lord Chancellor Cowper held, that it was competent to the defendant to go into the first point, though he eventually did not decide it in his favour. (*k*)

The reader is to be reminded here, that at the hearing of an appeal or rehearing, the Court will give the plaintiff leave to amend, by adding parties in the same manner as upon an original hearing, and will order the rehearing to stand over for the purpose; and that it has gone to the extent of allowing the plaintiff to add the Attorney General as a party, either by converting the bill into an information and bill, or into an information only. (*l*)

The costs of a rehearing, as well as of an original hearing, are in the discretion of the Court; but, generally, if an appeal is dismissed, it will be with costs.

By Lord Lyndhurst's Order (*m*) before referred to, by which the deposit upon petitions for a rehearing or appeal has been augmented to £20, (*n*) it is directed that the deposit shall be *paid to the adverse party, when the decree or order is not varied in any material point, together with the further taxed costs occasioned by the appeal or rehearing, *unless the Court shall otherwise order.* Under this order it has been held, that the Court has a discretion over the deposit as well as over the costs; and, therefore, in a case before Lord Brougham, upon an appeal, although his Lordship affirmed the decree of the Vice Chancellor, he did so without costs, and directed the deposit to be returned to the appellant. (*o*)

[*128]

It is to be recollected, that, under the undertaking required to be signed by the appellant or his Clerk in Court, upon obtaining an order to set down a rehearing or appeal, the Court has authority to direct the appellant to pay to the respondent any costs he may have been put to in prosecuting the decree or order appealed from in the Master's Office.

A respondent can in no case be made to pay costs, but where he has made use of evidence which was not read at the hearing, that circumstance should be taken into consideration in disposing of the costs of the rehearing. (*p*)

We have seen before, that where an appellant makes use of evidence which was not read below, he can only be permitted to do so on condition of giving up his deposit. (*q*)

In *Oldham* v. *Stonehouse*, above referred to, (*r*) where a plaintiff appealed from a decree which had been pronounced in his favour with costs, and, upon the rehearing, the respondent satisfied the Court, that he was entitled to no decree at all, Lord Cottenham, as we have seen, reversed the decree and dismissed the bill, giving the defendants the costs up to, and of the hearing, but he refused to give them the costs of setting the decree right. (*s*)

(*i*) Rawlins v. Powel, 1 P. Wms. 299. (*k*) Ibid.
(*l*) President of St. Mary Magdalen v. Sibthorp, 1 Russ. 154. *Ante*, vol. 1, 521.
(*m*) Ord. 1828, XLII. (*n*) *Ante*, p. 121, n. (*b*).
(*o*) Rattenbury v. Fenton, Cooke's Orders, 21.
(*p*) Williams v. Goodchild, 2 Russ. 91. (*q*) *Ante*, p. 125.
(*r*) *Ante*, p. 126.
(*s*) Oldham v. Stonehouse, 3 M. & C. 317.

*SECTION III. [*129]

Of Appeals to the House of Lords.

Any person who feels himself aggrieved by a decree or order of the Court of Chancery, is entitled, as a matter of right, to appeal to the House of Lords.

The mode of obtaining the interposition of this tribunal, in the case of an appeal from this Court, is by petition of appeal, which may be preferred from an interlocutory as well as from a final order; in which respect appeals from Courts of Equity, by petition, differ from appeals, by writ of error, from the judgments of the Courts of Law, which will only lie where the judgment is final. The reason for this distinction is stated to be, that Courts of Equity often decide the merits of a case, in intermediate orders, and the permitting of an appeal, in the early stage of the proceedings, frequently saves the expense of further prosecuting the suit; but in actions at law, no such orders intervene, consequently a writ of error cannot be brought before final judgment. (*a*)

It is, however, to be observed, that although appeals will lie to the House of Lords, from the interlocutory orders of Courts of Equity, it is only in cases where such orders have been pronounced by the Lord Chancellor; in other cases, appeals from the inferior Judges cannot be maintained, unless they have been signed and inrolled, in which case, as the signature of the Lord Chancellor, (which is necessary, before a decree or order can be inrolled,) converts the decree or order, though pronounced by the Master of the Rolls or Vice Chancellor, into a decree or order of the Lord Chancellor, an appeal will lie from it to the House of Lords. Where a decree or order has been pronounced by the Lord Chancellor himself, no inrolment is necessary to enable the party aggrieved by it from appealing. (*b*)

It may be laid down also, as a general rule, that an appeal *to the House of Lords, will only lie from a decree or order made in [*130] a cause or suit regularly instituted; (*c*) and that an appeal will not lie, from an order of the Lord Chancellor, in matters of idiotcy or lunacy, there being a distinction between the jurisdiction of the Court of Chancery, and the power of the Lord Chancellor; in those cases, an appeal lies to the Privy Council. (*d*) Also, no appeal to the House of Lords lies from an order of the Lord Chancellor, in matters of bankruptcy.

It seems, likewise, that an appeal will not lie from an order made by the Court, under the authority of an act of Parliament, specially authorizing such order, unless the power of appealing is given by the act itself; therefore, where an order was made by the Court of Exchequer, under the authority of an act of Parliament, to determine the right to a fund in Court, produced from an estate seized under an extent, from which order there was an appeal to the House of Lords, it was determined that an appeal would not lie; for if the case were considered as founded on the extent, it was a proceeding at law, and could

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(*a*) Palmer's Prac. of the House of Lords, 1. (*b*) *Vide ante*, vol. 2, p. 676.

(*c*) Palmer's Prac. H. L. 4; yet there is an instance on record in which it was held that a person conceiving himself aggrieved by an order of the Court of Exchequer, not made in any cause, for the filing of an ancient record that had been mislaid, might appeal to the Lords, and the party at whose instance the order was made was not permitted to decline their jurisdiction. Ibid.; Lord Wharton and Squire's Case, Colles' Cases in Parl. 270; *sed vide* the protest signed by eleven Lords on that occasion, and the resolutions of the House of Commons censuring the interference of the Lords. Ibid.; and 8 Harg. State Trials, 175.

(*d*) 3 P. Wms. 108; Rochfort v. Earl of Ely, 1 Bro. P. C. 450.

not be brought *per saltum* before the House; and considered as arising on the statute, no authority was given by the act to hear an appeal against the decision. The appeal was therefore dismissed, after very full consideration. (*e*)

By a standing order of March 24, 1725, (*f*) no petition of appeal from any decree or sentence of any Court of Equity in England or Ireland, or of any Court in Scotland, shall be received *after five years* from the signing and inrolling or extracting of such decree or sentence, and the end of fourteen days from [*131] and after the first day of the session or *meeting of Parliament next ensuing the said five years, unless the person, entitled to such appeal, *be within the age of one and twenty years, or covert, non compos mentis, imprisoned or out of Great Britain or Ireland;* in which case, such person shall be at liberty to bring his appeal within five years next after such disability shall cease, and fourteen days from and after the first day of the session next ensuing the said five years, but not afterwards. This order was amended in 1829, by substituting *two* years for *five*, within which the party must bring his appeal, and by ordering that in no case shall any person be allowed a longer time *on account of mere absence* to lodge an appeal, than *five* years from the date of the last decree appealed against. (*d*) It will be observed, that, by the foregoing amended order, *the two years* are, in the case of an appeal from a Court of Equity, *to be computed from the time of inrolling the decree;* (*e*) it has, however, been held, that an appeal brought from a decree more than *five* years after its inrolment, was saved by being extended to subsequent orders, the appeal from which was brought within two years from inrolling them. (*f*) In *Hicks* v. *Cook*, (*g*) however, the Lords affirmed the decree, wholly because of the acquiescence.

By another standing order of the 13th July, 1678, (*i*) "petitions of appeal from a Court of Equity, must be presented within fourteen days from the first day of every session or meeting of Parliament after a recess, after which time the Lords will receive no petition of appeal, unless upon a decree made whilst the Parliament is actually sitting; in which case, the party who shall find himself aggrieved, may bring his petition of appeal, provided he presents it within fourteen days after such decree is made and entered in any Court of Equity in England or Wales, twenty days in any of the Courts in Scotland, and forty days in any of the Courts of Equity in Ireland." (*k*)

The next requisite to be observed, before presenting an appeal, is that of [*132] giving notice, or as it is termed in Scotland, *intimation*, *to the other side, of the intention to present it, which is regulated by a standing order of the 9th of April, 1812, (*l*) whereby, "to prevent delay on the part of respondents to appeals, in delivering their printed cases, it is ordered that, previous to any petition of appeal being presented to the House, a notice shall be given to the agents of the parties respondents, of the time when such petition is intended to be presented; and the day of giving such notice, shall be indorsed by the petitioner's agent, on the back of the appeal."

A petition of appeal to the House of Lords is nearly the same in form, *mutatis mutandis*, as a petition for rehearing in the Court of Chancery. (*ll*)

"By an order of the 3rd of March, 1697, (*m*) all appeals are to be signed by two counsel, but no person may presume, as counsel, to sign any appeal,

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(*e*) Wall v. the Attorney General, Lords' Journ. 1822, Palmer's Prac. H. L. 5.
(*f*) Lords' Journ. 1725. (*d*) *Vide* 4 Clark & Finnelly, 562.
(*e*) De Burgh v. Clark, ibid.; Brooke v. Champernown, ibid. 247.
(*f*) De Burgh v. Clarke, *ubi supra*. (*g*) 4 Dow. 29.
(*i*) Lord's Journ. 1678. (*k*) Palmer's Prac. H. L. 13.
(*l*) Lords' Journ. 1812. (*ll*) *Ante*, p. 118.
(*m*) Lord's Journ. 1697.

unless he has been of counsel in the cause below, or shall attend as counsel at the bar of the House, when the appeal is to be heard; *and unless he shall certify that, in his judgment, there is reasonable cause of appeal.*" (*n*)

But, notwithstanding the latter words in the above order, it appears not to have been the practice, a short time ago, for counsel signing appeals formally to certify that there is reasonable cause of appeal, though the signature of counsel was always understood to import it; (*o*) probably, the omission of this certificate arose from the order of the House of Lords, which will be noticed presently, requiring the parties to appeals, to print their cases forthwith; the object of which appears to have been the same as that requiring the certificate of counsel, viz: to prevent appeals merely for delay and vexation. (*p*) It appears, however, to be now the practice for counsel to certify that there is reasonable cause for appeal. (*q*)

When the petition of appeal has been settled and signed by counsel, with a certificate of reasonable cause, it must be fairly engrossed, that is transcribed in a strong round hand on parchment, (the words to be written at length,) with the names *of the counsel, as well to the appeal as to the certificate, copied to it, and the certificate of notice is to be indorsed. (*r*) [*133]

A petition of appeal, like all other petitions to the Lords, is are presented by a Peer, who mentions it to the House in the words of the title, and moves that the petition may be read; the Clerk, thereupon, reads the prayer, and the proper order is made as a matter of course. (*s*)

This order, which is called the order of summons, is usually in the following form:—

Die Januarii, 18

"*Upon reading the petition and appeal of A. B., complaining of a decree (or order,* as the case is,) of the day of and praying, &c.: *it is ordered by the Lords spiritual and temporal, in Parliament assembled, that the said C. D., (the respondent,) may have a copy of the said appeal, and do put in his answer thereto, in writing, on or before the day of next; and service of this order upon any of his counsel, his solicitor, Clerk in Court, or known agent in the Court below, shall be deemed good service.*

"*G. H. R. Cler. Parliamentorum.*"

Upon English appeals the time limited for answering is a fortnight, in Scotch appeals, four weeks, and in Irish appeals, five weeks from the date of the order.

The order in an English cause, may be served on the respondent, if in London, or his solicitor or Clerk in Court. If the appeal be from Ireland, the order should be sent off without delay, to be served there; but care must be taken, by the appellant's solicitor, to enter into a recognizance as after-mentioned, otherwise the appeal will fall to the ground.

The mode of serving the order is by delivering a true copy of it, and at the same time shewing the original order.

When the order is served, there should be an affidavit of the service indorsed on it, in the usual form.

(*n*) Palmer's Prac. H. L. 16.

(*o*) *Per* Lord Eldon, Way v. Foy, 18 Ves. 452.

(*p*) Ibid. (*q*) *Vide* Palmer's Prac. H. L. 23.

(*r*) *Vide* Palmer's Prac. H. L. 23.

(*s*) Ibid. 24. The usual mode is for the agent to put the appeal into the hands of the Clerk Assistant at the House, or to leave it with the Clerk of the Journals at the Parliament Office, either of whom gets a noble Lord to move it; but should it happen, that those gentlemen are too much engaged, the agent must apply to some Lord to move the appeal, in which there will be no difficulty. Ibid.

[*134] *If the appeal be from the Court of Chancery or Exchequer in England, the affidavit may, in the first case, either be sworn before a Master in Chancery in London, or a Master extraordinary in the country; and in the latter, before a Baron of the Exchequer in London, or a Commissioner for taking affidavits in that Court, in the country; and in Irish appeals, affidavits are made before an Irish Master, &c., in like manner. If the order, in either case, should be served by a person coming to London, the affidavit can be sworn here. (*t*)

After an appeal has been lodged, the appellant is, within eight days, to enter into recognizance to answer costs, pursuant to the following standing order:—

January 26th, 1710. "It is this day ordered, that in all cases of appeals to be brought into this House, from any Court in Westminster Hall, from any Court of Equity in England or Wales, from any Court in Scotland, or from any Court of Equity in Ireland, the parties appellant shall, within eight days after such appeal received, give security to the Clerk of the Parliaments, by recognizance, to be entered in to his Majesty in the penalty of £400, conditioned to pay such costs to the defendant as this Court shall appoint, in case the decree appealed from shall be affirmed; and if the appellant or appellants shall neglect to give such security within the time aforesaid, the Clerk of the Parliaments shall inform the House thereof and the appeal from thenceforth to be dismissed." (*u*)

If the appellant should not be in London to enter into the recognizance, his solicitor, or some other person for him, may enter into it, for which the leave of the House must be obtained; this is done upon a motion, to be made by a Lord.

The defeazance of the recognizance is in the following form:—

"*The condition of this recognizance is, that whereas A. B., of, &c., has brought his appeal before the Right Honourable the Lords spiritual and temporal in Parliament assembled, to be relieved against a decree (or order, as the case is,) of the Court of Chancery of the day of If, therefore, the said appellant, his heirs, executors, or administrators, *shall well and truly pay, or cause to be paid, unto C.* [*135] *D., respondent to the said appeal, his heirs, executors, or administrators, all such costs as the said Lords in Parliament shall appoint, in case the said decree (or order, as the case is,) shall not be reversed, then this recognizance to be void and of none effect, or else to remain in full force and virtue.*"

The recognizance, which is written on unstamped parchment, is signed by the appellant or his surety, and witnessed by the Clerk of the Parliament.

Although the words of the order for entering into recognizances are general, yet, in practice, there is an exception, viz:—

In appeals brought by the Attorney General on behalf of the Crown, no recognizance for costs is entered into, because costs are never awarded against the King. (*uu*)

If an answer be not put in within the time limited for that purpose, the appellant's agent should obtain a peremptory order upon the respondent to answer. (*x*)

To obtain such peremptory order, the appellant's agent leaves at the Parliament Office the first order with the affidavit of service, and, upon the Clerk's reading the affidavit in the House, the peremptory order is made as a matter of course; but, in point of regularity, this order ought to proceed upon the motion of a Peer. (*y*)

(*t*) Palmer's Prac. H. L. 25.
(*u*) Lord's Journ. 1710.
(*uu*) Palmer's Prac. H. L. 28.
(*x*) Lords' Journ. Jan. 19, 1719.
(*y*) Palmer's Prac. H. L. 28.

A week is always the time limited by a peremptory order, and, upon the expiration of the week, if no answer has been put in, the appellant's agent may apply to the House by motion, to be made by a Peer, to have the cause appointed for hearing *ex parte*.

Although the Lords expect that parties should conform to their standing orders, yet, when circumstances manifestly require it, they will dispense with them; as where, by reason of sickness or other inevitable accident, the agent has been prevented from presenting an appeal, or the respondent from filing his answer within the limited period; and so, in all *cases, where there has been no wilful neglect, provided it can be made appear that no inconvenience is likely to accrue from refusing the indulgence; but in these cases an order must be obtained to dispense with the standing order, upon a petition for that purpose. [*136]

This petition is to be moved by a Peer, upon which occasion the agent must attend the House; for, in these cases, he is called to the bar and examined by the House as to the allegations of the petition, and, sometimes, he is sworn to the truth of them.

Petitions of this description, however, are now generally referred to the Lords' Committees of Appeals. (*z*)

On being served with the order to answer, the respondent should instruct an agent to apply at the Parliament Office and bespeak an office copy of the appeal; and, if the respondent wishes to expedite the hearing, he may, on having notice that an appeal is intended, and, without waiting till the order of summons is served, or the time for answering expired, put in his answer.

Answers are of two kinds, one general, the other special.

A general answer is in the following form:—

The answer of C. D. respondent to the petition and appeal of A. B. appellant.

*The respondent, not confessing or acknowledging all or any of the matters and things in the said petition and appeal mentioned to be true as the same are therein set forth, and reserving to himself all benefit and advantage of exception to the errors, defects, and imperfections in the said appeal contained, for answer thereunto saith, he admits that the Court of Chancery, (or the Court of Exchequer, or the Court of Chancery or Court of Exchequer in Ireland,) did make such decree or order, as in the said petition and appeal is (or are) mentioned and complained of, but as to the date and contents of such decree (or order) the respondent, for greater certainty, refers to the said decree (or order) when the same shall be produced; but the respondent is advised, and humbly apprehends, that the decree (or order) complained *of, is agreeable to equity and justice, and, therefore, humbly hopes the same will be affirmed and the appeal dismissed with costs.* [*137]*

E. F., agent for the respondent.

It sometimes happens that the respondent determines to bring a cross appeal, in which case the answer should be qualified thus, "that the said decree, *so far as the same is complained of by the said petition and appeal is agreeable to equity*," &c.

An answer is *special*, when particular facts are stated, or some specific matter is alleged, either upon the merits of the cause, or upon any defect in form in the appeal; such as that there are not proper parties; or that the decree or order appealed from did not become final, but remains under review or rehearing; or that the date or purport of the decree or order is erroneously stated in the appeal. But special answers have not for a long time been deemed neces-

(*z*) Palmer's Prac. H. L. 31.

sary nor used in practice, and in fact, the matters here noticed are more properly grounds for an application to the House to dismiss the appeal for irregularity, of which we shall speak hereafter. It is, therefore, of little use to the respondent to point out objections by his answer; and the more general the answer is the better, especially as any errors or defects pointed out by a special answer, can be amended by application to the House; so that, in truth, they would only be productive of expense and delay.

Answers are engrossed on parchment, and then lodged in the Parliament Office, when the Clerk marks on it the day it is brought in, according to a standing order of the 5th of April, 1720, (*a*) by which it is "Ordered, that, when any answer to an appeal shall be put in for the future, the Clerk, to whom it shall be delivered, do immediately endorse thereon, the day on which such answer is brought in, and that the names of the parties answering, and to whose appeals such answers are put in, be, the same day, entered in the Journals of the House." (*b*)

[*138] *In some cases both parties are dissatisfied with the determination of the Court below, and the respondent as well as the appellant is advised to prefer a cross appeal; the time allowed for bringing in which is limited by the standing order of the 8th March, 1763, (*c*) to one week after answer put in to the original appeal, after which the same will not be received. If the time limited by the last recited order for presenting a cross appeal be elapsed, the House, on petition, will grant leave to present it *nunc pro tunc*, if good cause can be shewn for the omission. (*d*)

A cross petition of appeal is, in form, the same as an original appeal, except that it must be entitled, "The petition and cross appeal," &c., and should specify the particular part of the decree or order of which the petitioner complains. It is presented and moved, and an order made upon it, in the same manner as upon an original appeal.

The order of the 27th of January, 1719, is silent as to recognizances for costs in cross appeals. It is said that, formerly, they were sometimes entered into, but they are not now required. Cross appeals must, however, be signed by counsel, although that is not expressly directed by the order of the 3rd of March, 1697. (*e*)

The order, to answer a cross appeal, may be served in the same manner as the order in an original appeal; but the respondent in the cross appeal being appellant in the original appeal, *et e contra*, by which both parties are in Court, service of the order upon the agent of the respondent in the cross appeal is sufficient. (*f*)

The answer to a cross appeal is in the same form with that to an original appeal, except that the title is, "The answer of A. B. to the petition and cross appeal of C. D.," and that, towards the end, instead of saying "That the decree, &c., is just," &c., it should be "That the decree, *in so far as is complained of by the said C. D.* is just and agreeable to equity," &c. (*g*)

[*139] *In case the session ends before the time limited for answering an appeal expires, this circumstance is provided for by the following standing order:

"28th of March, 1735.—It is ordered, that when upon an appeal to this House, an order shall be made for the respondent to answer by a time limited, if the session of Parliament wherein such order shall be made, shall determine

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(*a*) Lord's Journ. 1720.
(*b*) Palmer's Prac. H. L. 33.
(*c*) Lords' Journ. 1763.
(*d*) Palmer's Prac. H. L. 34.
(*e*) Ibid.
(*f*) Ibid.
(*g*) Ibid.

before the time so limited for answering shall be expired, and no answer shall be put in during the same session, service of such order upon the respondent, five weeks before the first day of the then next session, shall be deemed good service, and the appellant may apply for a peremptory day, in case the respondent shall not put in his answer within three days from the first day of the next session of Parliament." (*g*)

Formerly some doubts and questions arose as to the effect of prorogations and dissolutions of Parliament, and whether the judicial as well as legislative proceedings of the Lords, were not thereby determined; in consequence of which, it has been determined, "that in all cases of appeals and writs of error, they continue and are to be proceeded on in *statu quo*, notwithstanding a prorogation or dissolution of Parliament. (*h*)

By a standing order of the 5th of April, 1720, it is—"Ordered, that all such appeals as shall be presented in any session, to which answers shall be put in during the same session, and for hearing whereof no day shall be appointed in such session, if neither the appellant or respondent shall apply to this House within eight days, to be accounted from the first day of the next meeting of Parliament, for a day of hearing, such appeals shall stand dismissed, but without prejudice to the appellants presenting any new appeals thereafter." It is also—"Ordered, that all such appeals as shall be presented in any session to which no answer shall be put in during the same session, if neither the appellant, within eight days from the first day of the next meeting of Parliament, shall apply to this House to appoint a peremptory day to *answer, nor the respondent put in an answer within the said eight days, such [*140] appeals shall stand dismissed, but without prejudice to the appellant's presenting any new appeals thereafter." (*i*)

The House of Lords will permit a petition of appeal to be amended after it has been presented: (*k*) thus if any error is discovered in the petition, or if the appellant is advised that some previous orders are so connected with the order appealed from, that it will be impossible to do justice to his case without extending his appeal to these former orders, he should apply for liberty to amend his appeal. (*l*)

To obtain leave to amend, a petition must be presented, of which two days' notice in writing is to be given to the opposite agent, and it should be accompanied by a copy of the petition.

On the moving of this petition, it will be proper for the agents, on both sides, to attend the House, in order to answer any question which may be asked by their Lordships; and, lest the adverse agent should not attend, the petitioner's agent should be prepared to prove, at the bar of the House, the service of the notice and petition.

These petitions, however, are usually referred to the Appeal Committee.

Applications to amend are not confined to the appellant, but may also be made by the respondent, who is interested in seeing that all the proceedings are correct, except that the respondent's petition should pray—"That the appellant may be ordered to amend his appeal in the particulars set forth, and to amend the respondent's copy."

If an appeal be amended after the respondent has put in an answer, and it is considered necessary that a new answer should be put in to the amended appeal, he must obtain an order for leave to withdraw the former answer, and put in a new one, in which case the respondent will be entitled to costs.

(*g*) Palmer's Prac. H. L. 36; Lords' Journ. 1735.
(*h*) Palmer's Prac. H. L. 37.
(*i*) Palmer's Prac. H. L. 38; Lords' Journ. 1720.
(*k*) Ibid.
(*l*) Bouchier v. Dillon, 5 Bligh, N. S. 714.

[*141] *An order to this effect may be obtained on petition; but if the respondent do not voluntarily apply for such an order, and put in his answer, the appellant may proceed against him by a new peremptory order, and may get the cause set down *ex parte*, as already mentioned. (*m*)

If the appellant finds it expedient to withdraw his appeal, he must obtain leave of the House to do it by petition; of which two days' notice must be given to the respondent's agents, as in other cases, and a copy of the petition also served; but the House will not grant the prayer of it without ordering the appellant to pay the respondent his costs, nor in some instances without the consent of the respondent's agent; for there may be cases in which it would be unjust to permit the appellant to withdraw his appeal, and thereby leave him at liberty, at a considerable distance of time afterwards, to bring a new appeal, which he might do notwithstanding the withdrawing of his former appeal. (*n*)

In case an appeal should be presented, which the respondent has reason to think is irregular, a counter petition should be presented praying to have it dismissed, and the respondent's agent must give two days' notice to the appellant's agent, of his intention, and should, at the same time, serve him with a copy of the petition, and both agents should attend on presenting it; on which occasion, (unless there shall manifestly appear to be some palpable breach of the standing orders of the House, or of the legislative enactments respecting appeals, in which case the appeal will be dismissed at once,) the petition will be referred to the Appeal Committee, before which the agents and counsel, if desired, will be heard; (*o*) in questions of great importance, however, the arguments have been heard at the bar of the House. (*p*)

It is to be observed here, that if an irregular appeal is presented, the counter petition should be presented before the original appeal is answered, for if the respondent treats it as an effective appeal, by answering it before he presents

[*142] his *counter petition, he will not be entitled to costs. (*q*) The usual course of the House, upon such a counter petition being presented, is to refer the petitions to the Appeal Committee, but upon questions of importance they will be directed to be argued at the bar, by counsel. (*r*)

After the answer is put in, either the appellant or respondent may apply to the House, by motion, to have the appeal appointed to be heard.

It sometimes happens that there are two appeals which relate to the same subject, or in which the questions in both are similar, and that one of them has been set down, so as to stand several causes before the other, in such a case, the House, upon a petition, will order the second to stand next to the first. (*s*)

By an order of June the 8th, 1749, "It is ordered, that all such appeals as have been presented, for hearing whereof days shall be appointed in any session, which shall not be determined in the same session, shall be heard and determined in the beginning of the next session, in the same order as they stand to be heard at the end of this or any future session, without any new application to appoint a day for hearing the same. (*t*)

It frequently happens that the appellant or respondent dies before the hearing of the cause, in which event the appeal must be revived by petition to the House, in the name of the deceased party's heir or personal representative, or both, as the occasion may require, and supplemental cases delivered. This is regulated by the standing order of the 20th of March, 1823—"Whereby it is ordered that where any parties to an appeal shall die, pending the same, sub-

(*m*) Palmer's Prac. H. L. 42.
(*n*) Ib. 43.
(*o*) Ib. 44.
(*p*) Norbury v. Meade, 3 Bligh. 274.
(*q*) Norbury v. Meade, 3 Bligh. 274.
(*r*) Ibid.
(*s*) Palmer's Prac. H. L. 46.
(*t*) Ib. p. 48.

sequently to the printed cases having been delivered, and the appeal shall be revived against the representatives, a supplemental case shall be delivered by the parties so reviving the same, stating the order or orders made by the House in such case.

"And the like rule shall be observed by the appellant and *respondent where parties in the Court below have been omitted in the appeal, and shall, by leave of the House, be added as parties to the appeal after the delivery of the printed cases." [*143]

For the better information of the Lords as to the matters in controversy, printed statements of the appellant's and respondent's cases are usually delivered to them, which cases, before they are printed, must be signed by counsel.

The cases should contain all the material facts, and should concisely narrate the proceedings, and the substance of the pleadings and evidence or proofs, whether consisting of documents or depositions, and particularly those on behalf of the party whose case it is. By an order of the 24th day of February, 1813, it is "Ordered, that the printed cases delivered in appeals and writs of error depending in the House, shall contain a copy of so much of the proofs taken in the Courts below, as the parties intend to rely on at the hearing, together with reference to the documents where the same may be found." (*t*)

But although the preceding order directs that the parties shall print the proofs they mean to rely on, it was said, by Lord Eldon, "That the rule was made by the House for the purpose of guarding itself, but that it is competent to the House to hear evidence not printed, if it thinks proper. The parties are to print what they think material: but, in such a case as that, it was too much to suppose that any one could infallibly say what was and what was not material." (*u*)

By the standing order of the 19th of April, 1698, for preventing scandalous and frivolous printed cases being delivered to the Lords, it is ordered that no person whatever do presume to deliver any printed cases to any Lord, unless such case shall be signed by one or more of the counsel who attended the hearing in the Court below, or shall be of counsel at the hearing in this House. (*x*) But, although the order expresses that the cases may be signed by one or more counsel, the usual course is to have them signed by two. (*y*)

*When the case has been signed by counsel, there are commonly 500 copies printed off, and usually a dozen of them are printed on fine large paper, for the use of the parties' own counsel and agent, and to exchange with the adverse agent for him and his counsel. This large number is necessary, because it is customary to send 350 copies to the Parliament Office. (*z*) [*144]

Formerly, by a standing order of the 12th of January, 1724, the appellants and respondents were to deliver to the Clerk of the Parliaments, to be distributed to the Lords, the printed cases, at least four days before the hearing; but this is now regulated by an order of the 12th of July, 1811,—"Whereby it is ordered, that, when any appeal shall be presented on or after the first day of a session, the appellant and respondent shall, severally, lay the prints of their cases upon the table of the House, or deliver the same to the Clerk of the Parliaments, *within a fortnight after the time appointed for the respondent to put in his answer:* and in default of so doing by the appellant, the said appeal shall stand dismissed, but without prejudice to his presenting a new appeal within the first fourteen days of the next session of Parliament, or within the then

(*t*) Lords' Journ. 1813.
(*u*) 4 Dow. 222.
(*x*) Lords' Journ. 1698; Palmer's Prac. H. L. 53.
(*y*) Ibid.
(*z*) Palmer's Prac. H. L. 56.

remainder of the time limited by the standing order, No. 18, (13th July, 1678,) for presenting appeals; and, in case of default on the part of the respondent, the appellant shall be at liberty to set down his cause *ex parte*." (*a*)

If, through any casualty, either of the parties' agents should be prevented from getting his case prepared in time to lay the prints on the table, pursuant to the standing order, he must present a petition for a further day, setting forth the cause of delay. (*b*)

In consequence of the great inconvenience arising by petitions for putting off causes, after days having been appointed for hearing thereof, it is ordered, that when a day shall be appointed for hearing any appeal or writ of error, the same shall not be altered but upon petition; and that no such petition shall be
[*145] received, unless two days' notice thereof be given *to the opposite party; of which notice, oath shall be made at the bar of the House. (*c*)

There may be many reasons for the postponement of a hearing besides that of not being prepared with the case, such as, that the agent has not received money to fee counsel; that copies of the proceedings, in Irish causes, have not been received; or that some material deed or instrument, exhibited in the Court below, has not been furnished; or that some essential paper or evidence is withheld by a person interested, or that papers are retained by a former agent, who holds them for his bill of costs, so that they cannot be obtained without an order from the House. In any of these cases, the House, upon petition and proof in support of it, will, if it thinks fit, make an order to postpone the hearing; and, in the last mentioned case, will also make an order upon the person in possession of such papers, to produce or deliver the same to the appellant or respondent, to be used on the hearing, but to be afterwards returned; or else that such documents shall be deposited with the Clerk of the Parliament Office, which, indeed, seems to be the most proper course. To this end the petition must be presented to the House, and notice of it, with a copy of the petition, served on the party, personally, if possible, two days at least before presenting it; and a longer notice, according to the distance of the party's residence. (*d*)

It was at one time considered absolutely necessary, when a suit abated after the appeal presented, to revive the *cause* in the Court below, before the *appeal* could be revived; but a different opinion, as well as practice, now prevails; and the order of the House gives no directions to revive the cause in the inferior Court. It will be time enough, therefore, when the appeal is decided, to revive the cause below, without doing which there can be no proceedings in it. (*e*)

When, however, the abatement takes place before the appeal has been presented, it is the better way to revive first, and to make the representatives parties to the appeal. (*f*)

[*146] Upon a petition being presented, the House will make an *order to revive the proceedings, and they will then go on as if the original appellant were living.

The supplemental case, which is directed by the standing order of the 20th of March, 1823, may be very short; merely stating the title of the appeal, the different facts set forth in the petition, and the order for the revival of the appeal; which case will not require the signatures of counsel, unless it contains arguments or observations; if it should, then it must be signed by counsel. It

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(*a*) Lords' Journ. 1724.

(*b*) Ib. 1811. *Vide* Way v. Foy, 18 Ves. 452, where the object of this order is stated by Lord Eldon; *Ante*, p. 132.

(*c*) Lords' Journ. 22 Dec. 1703.

(*d*) Palmer's Prac. H. L. 59.

(*e*) Ibid.

(*f*) Ibid.

must be printed and endorsed as the original case, and a sufficient number lodged at the Parliament Office. (*d*)

The order, it will be observed, also directs that supplemental cases shall be delivered, where parties in the Court below shall have been omitted, and shall, by leave of the House, be added as parties to the appeal, after the printed cases have been delivered. (*e*)

By the standing order of the 2d of March, 1727, only two counsel on each side can *argue;* but in cases of great importance and complication, it is not uncommon to call in a junior or third counsel for consultation and assistance. (*f*)

Though by the standing order only two counsel on a side are to be heard, which is founded on a supposition that there are but two parties or sets of parties interested; yet where it appears that the respondents have not identical, but separate, and perhaps conflicting, interests, the House will allow a third or additional counsel to be heard in support of such interests. To obtain leave to do so, it is usual to present a petition, for that purpose, stating the peculiar circumstances. An instance of this occurred in the appeal of *Gore* v. *Stackpoole*, in which their Lordships made an order, that an infant respondent might have counsel on his separate behalf. (*g*)

The mode and order of proceeding at the hearing is regulated by the standing order of the 2nd of March, 1727, above referred to, whereby it is ordered, that, at the hearing of causes, one of the counsel for the appellants shall open the cause; then *the evidence on their side shall be read, (*f*) which done, the other counsel for the appellants may make observations [*147] on the evidence; then one of the counsel for the respondents shall be heard, and the evidence on their side be read; after which, the other counsel for the respondents shall be heard, and one counsel only for the appellants to reply. (*g*)

When the arguments of counsel are finished, they withdraw from the bar, and the House, if then prepared, give their judgment, affirming the decree or order of the Court below, with or without costs; or reversing or varying the same, according to the circumstances of the case. If any Lord conceives that the decree or order is erroneous, he states his reasons, and moves that it be reversed or varied; and should the rest of the House be of that opinion, the motion is put and carried; but if it be opposed, then a debate ensues, and the question is put to the vote, on which occasion *proxies* are not allowed; and it being the rule of the House to put the question for *reversing* (*h*) the decree or order, unless, upon a division, there is a majority for the reversal, it will be affirmed.

On some occasions, the House, instead of affirming or reversing the judgment, gives directions to the Court below to rectify its judgment; in such cases, the order of the House of Lords must be made a rule or order of the Court of Chancery. (*i*) So also must it be, if the House of Lords reverse the decree of the Court, because, it may otherwise be carried into execution. In *Attorney General* v. *Scott*, (*k*) where a decree of the Court of Chancery was affirmed by consent, an application was made to the Court, to make the judgment an order of the Court of Chancery, but Lord Hardwicke doubted whether such a

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(*d*) Palmer's Prac. H. L. 82. (*e*) Ibid.

(*f*) Lords' Journ. 1727; Palmer's Prac. H. L. 14.

(*g*) 9th May, 1812, Palmer's Prac. H. L. 14.

(*f*) As to reading evidence upon appeals to the House of Lords, *vide post*, p. 194.

(*g*) Palmer's Prac. H. L. 68.

(*h*) By a standing order of the 14th of January, 1694, upon giving judgment in cases of appeal or writs of error, the question shall be put for *reversing* and not affirming the judgment of the Court below.

(*i*) Att. General v. Scott, 1 Ves. 419. (*k*) *Ubi supra.*

thing was ever done; nor indeed can it under any circumstances be necessary, [*148] where a decree is simply affirmed, *unless the proceedings under it have been suspended, pending the appeal.

An order, to make a judgment of the House of Lords upon an appeal, a rule or order of this Court may be obtained as of course on motion, upon production of the order signed by the Clerk of Parliament. (*l*)

It is to be observed, that the House of Lords possesses no officer to whom the taxation of costs can be referred; it is therefore usual to name a specific sum in the judgment, as the amount of costs to which the party to have them is entitled. This sum is usually settled by the agents on both sides; but if the agents cannot agree on the amount of the costs, as often happens, as there is no officer belonging to the House authorized or competent to tax them, if the sum demanded should appear to their Lordships to be unreasonable, they will order the bill to be referred to some agent or solicitor agreed on by both sides. (*m*) The House, also, has sometimes called in the assistance of a Master in Chancery, to determine what the amount ought to be; but this has been considered only as putting in force the recognizance, and not as a taxation, independent of that, by virtue of any inherent authority possessed by the House. (*n*)

When costs are awarded to the respondents on the affirmance of a decree or order appealed from, the order dismissing the appeal, with costs, should be served on the appellant, personally; and if the recognizance was entered into by any other person, the order, also, should, in like manner, be served on him, and the costs demanded of each by the person to whom they are ordered to be paid, or some person by him deputed, by power of attorney, to receive them. It will be proper to serve the order, also, on the agent.

In case of non-payment of the costs, the respondent petitions the House that the party may be compelled to pay to him the sum of £— ordered to be paid to him as costs. When this petition is presented, the respondent must be pre- [*149] pared *to prove, at the bar of the House, the personal service of the order, and the demand and refusal of the costs. The House may then either order the parties into custody, for the contempt, (*o*) or direct the recognizance to be estreated into the Exchequer, which latter is the usual mode. (*p*)

Before quitting the subject of appeals to the House of Lords, it is right to mention that a material distinction exists between them and rehearings in the Court below, with regard to evidence. We have seen, (*q*) that, upon the rehearing of a cause before the Lord Chancellor, by way of appeal, the reading of evidence, not read in the Court below, is, under certain restrictions, permitted; in the House of Lords, however, this principle universally prevails, that no evidence can be received which was not laid before the Court below, nor can any evidence, which was received below, be objected to above, unless the admission of improper evidence be among the points of appeal. (*r*)

(*l*) 2 Harr. Ch. P. 351; Seton on Dec. 392 (n) 2; *vide etiam* Hand's Prac. 124; Equity Draftsman, 625.

(*m*) Palmer's Prac. H. L. 74. (*n*) Exp. Wheeler, 3 V. & B. 21.

(*o*) As was done in the case of Mr. Carey, Lords' Journ. 21st of March, 1717–18, Harg. Pref. 208; but this is hardly ever done now.

(*p*) Palmer's Prac. H. L. 73. (*q*) *Ante*, p. 124.

(*r*) Eden v. Earl Bute, 1 Bro. P. C. ed. Toml. 465; and *vide* Baesh v. Moore, 3 Bro. P. C. 546; and Button v. Price, Prec. in Ch. 212.

It may be mentioned also, that where evidence has been rejected below, which the House thinks ought to have been received, the usual course is to remit the cause to the Court below; it seems, however, that before doing this the House of Lords will look at the rejected evidence in order to see whether, if it were admitted, it would affect the opinion of the House in forming their judgment. (*s*)

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*CHAPTER XXIX. [*150]

OF SUPPLEMENT AND REVIVOR.

SECT. 1.—*Supplemental Bills.*

IN the preceding chapters, the attention of the reader has been directed to the rules and course of proceeding in a suit originally perfect in its frame, and in which no incidental circumstances have occurred to alter the state of the original parties, or the relation in which they stood to each other, at the commencement of the proceeding. In a suit in Chancery, however, which frequently embraces a variety of matters, and affects the interests of many parties, it often happens that the suit, though perfect in its institution, has, by some event subsequent to the filing of the original bill, become defective, or has abated, so that no proceeding can be had, either as to the whole or some part; or it may happen that there is some imperfection existing in the frame of the original bill, which was not discovered in time to allow of its being corrected by amendment. When such is the case, the rules of the Court furnish means of supplying the defect, by permitting the exhibition of what are termed, supplemental bills, and bills of revivor, the former of which are applicable to cases in which the defect was either in the original proceeding or has been occasioned by some event subsequent to the institution of the suit, so that the proceedings as they stand, cannot have their full effect; the other being applicable, where, by some subsequent event, there is no person by whom or against whom the suit in the whole or in part can be prosecuted. (*a*) There are also other bills known in practice, which, though they are not strictly supplemental bills, or bills of revivor, strongly resemble them as well in form as in the practice consequent upon them; bills of this description are generally termed *"bills in the nature of supplemental bills," or "bills in the nature of bills of revivor." [*151]

In some instances, the abatement of the suit gives rise to new matters which it becomes necessary to introduce into the proceedings, in which cases the proper remedy is by bill of revivor and supplement.

A supplemental bill may be necessary to remedy defects in a suit, either existing at the time when the original bill was filed or which have since occurred in consequence of the birth of new parties or a change in the interests of those originally on the record.

(*s*) M'Cabe v. Hussey, 5 Bligh, N. S. 715, 729.
(*a*) Lord Red. 44.

When the imperfection of a suit arises from a defect in the original bill, or in some of the proceedings under it, and not from any event subsequent to the institution of the suit, it may be added to by supplemental bill; (*b*) nothing, however, which occurred prior to the filing of the original bill, ought to be added by way of supplement, unless the state of the cause is such, that an amendment can no longer be obtained; but when the original bill cannot properly be amended, as where witnesses have been examined and publication passed, then any new matter necessary to be put in issue must be introduced by supplemental bill: (*c*) upon this ground, where, after publication had passed and the cause set down, the statement of a will was introduced into the original bill, in order that the opinion of the Court might be taken upon the construction of it, Lord Hardwicke, at the hearing, considered the introduction of the will into the original bill by amendment, after publication passed, as irregular; nevertheless, he ordered the case to stand over, and the plaintiff to be at liberty to bring the will regularly before the Court, by supplemental bill or otherwise, as he should be advised. (*d*)

It may be observed, that if a plaintiff has omitted to pray proper relief by his bill, and has not stated a case which may enable him to procure an extension of the relief prayed under the prayer for general relief, the Court will not, [*152] at the hearing, allow the case to stand over in order to afford the plaintiff *an opportunity of filing a supplemental bill. Thus where the plaintiff, an annuitant, filed a bill as a specific incumbrancer, but omitted to pray relief as a general creditor, to which he was entitled under his security, and, upon the death of the original defendant, revived the suit, but did not avail himself of the opportunity to extend the relief by supplemental bill, Sir Anthony Hart, although he thought that, if the suit had been properly framed, the plaintiff would have been entitled to relief as a general creditor, or, if a case for it had been made by the bill, which it was not, might have claimed such relief under the prayer for general relief, refused to cure the defect by straining the decree, nor would he give liberty at that period to add any thing to the record by way of supplement. (*e*)

The question whether, when the cause is in such a state that a plaintiff cannot amend his bill without special leave of the Court, he may, without such leave, file a supplemental bill for the purpose of introducing matter which existed at the time when the original bill was filed, but which was not discovered till afterwards, has been recently the subject of discussion. In *Colclough* v. *Evans*, (*f*) an attempt was made, after replication, to evade the necessity of obtaining special permission to amend, by filing a supplemental bill, the object of which was to put in issue, and obtain a discovery of, facts and documents, which, if the record could have been amended, might have been introduced by amendment, but which, it was alleged, were not known to the plaintiffs till after the original suit was at issue; but the Vice Chancellor, upon demurrer, held that such a bill could not be sustained, as it would be permitting the plaintiffs to do indirectly what the new orders (*g*) intended should not be done, except upon special leave; he, therefore, allowed the demurrer, but without prejudice to the plaintiffs, making such application, to withdraw the replication and amend their original bill, as they might be advised.

It is to be remarked, that, in the above case, the supplemental bill sought to change the issue raised by the original bill between the parties, and to make a new and different case; and that, in a subsequent case, (*h*) where that was not

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(*b*) Lord Red. 49.
(*c*) Goodwin v. Goodwin, 3 Atk, 370.
(*d*) Ibid.
(*e*) Field v. Delaney, 1 Moll. 174.
(*f*) 4 Sim. 76.
(*g*) *Vide ante*, vol. 1, 538.
(*h*) Crompton v. Wombwell, 4 Sim. 628.

*attempted, and the only object of the supplemental bill was, without varying the case or the relief sought, to bring before the Court [*153] matter discovered since the original bill, which would have concluded the defendant, the same learned Judge, upon demurrer, held that the bill might be sustained. In a recent case, (*i*) however, Lord Cottenham appears to have expressed a doubt as to the correctness of the distinction drawn by his Honor; though his Lordship did not, upon that occasion, give any opinion (it being unnecessary to do so,) upon the question whether it is requisite, previously to filing a supplemental bill, for the purpose of putting in issue matter discovered since the filing of the original bill, which is properly the subject of amendment; (but which cannot be introduced in that form, by reason of the cause being in that state, that the original bill cannot be amended, without special leave for that purpose,) to obtain the previous sanction of the Court. His Lordship, however, intimated an opinion, that if special leave is necessary, the application for it must give the Court as much information as would be required, for the purpose of obtaining leave to amend a second time after full answer.

Matters which have occurred since the original bill was filed, and which are material to perfect the plaintiff's case, may also be introduced into the record by supplemental bill. Thus where a plaintiff has an inchoate right at the time of filing his original bill, but which merely requires a formal act to complete it, which is not performed till afterwards, such formal act may be brought before the Court by supplemental bill, as in the instance of an executor or administrator filing a bill before probate or administration taken out; in such a case, as we have already seen, (*k*) the fact of the probate or administration having been granted, may be introduced by amendment, but if the record is not in a state to admit of amendment, it may be introduced as well by supplemental bill. (*l*)

The reader is to be reminded, that a plaintiff cannot support a bad title, by acquiring another after the filing of the original bill, and then bringing it forward by supplemental bill: thus in *Tonkin* v. *Lethbridge*, (*m*) [*154] where the *plaintiff filed his original bill to redeem a mortgage as heir-at-law of the original mortgagor, and, upon an issue directed, was found not to be heir; but, in the meantime, he had bought in the interest of a third person of the name of Kekewich, who claimed to be heir, and had amended his bill by stating that fact and upon the issue being found against him, he filed a supplemental bill stating the purchase from Kekewich, and praying that he might be declared entitled to the redemption and conveyance prayed by the original bill. To this supplemental bill the defendant demurred, "because it did not appear by such supplemental bill, that any new matter had arisen since the filing of the original bill in the cause, which was properly matter of supplement," (*n*) and the demurrer was allowed; Lord Eldon observing, that, to entitle a plaintiff, by a supplemental bill, to the benefit of the former proceedings, it must be in respect of the *same title*, in the *same person* as stated in the original bill. "If," says his Lordship, "in the present case, the title now relied on was stated in the original bill, that is a ground for a rehearing of the cause; if it is not, then any third person as well as the plaintiff, might file a

(*i*) Attorney General v. the Fishmongers' Company, 4 M. & C. 1.
(*k*) *Ante*, vol. 1, p. 514.
(*l*) Humphreys v. Humphreys, 3 P. Wms. 508.
(*m*) Cooper's Rep. 43.
(*n*) Another ground of demurrer was taken, viz: that it appeared that the plaintiff sought relief touching the purchase of a certain pretended title, which purchase, if any such was made, was contrary to law; but the decision appears to have turned upon the first ground, as stated in the text.

supplemental bill. If two original bills had been filed to redeem, one by the present plaintiff, and the other by Kekewich, and then the issue at law was found in favour of Kekewich, whereupon the plaintiff had bought Kekewich's title, it is clear the purchase should be stated by supplemental bill, in Kekewich's suit, and not in the present plaintiff's." The same principle appears to have been acted upon by Lord Thurlow, in *Davidson* v. *Foley*, (*o*) and by Lord Brougham, in *Pritchard* v. *Draper*. (*p*)

It is, however, to be remarked, that it is only where the first title is absolutely bad, that a supplemental bill of this description will be improper; where the plaintiff had originally a good inchoate title, which only required some formal act to make it perfect, as in the cases pointed out in a former part of this Treatise, (*q*) there the statement of such act by supplemental bill will
[*155] *be permitted, if it cannot be properly done by amendment. Thus in *Mutter* v. *Chauvel*, (*r*) where the plaintiff claimed a right to the rents and profits of a benefice by virtue of a nomination by himself, under an equitable right to nominate, derived from his father's will, and filed his bill against the incumbent, and others who claimed the right of nomination in opposition to the plaintiff, for an account of such rents and profits from the time of his nomination, &c.; and it appeared, upon the hearing, that a deed of release from his sisters to the plaintiff, which formed an essential part of the plaintiff's title to the right of nomination, was not executed till long after the filing of the bill, Sir J. Plumer, M. R., permitted the case to stand over, with liberty to the plaintiff to file a supplemental bill, for the purpose of regularly introducing the release from his sisters.

A supplemental bill, for the mere purpose of bringing parties before the Court, who ought to have been parties to the original bill, may be filed at any period of the cause; and it is not unfrequently the case, that where a cause, at the hearing, has been ordered to stand over, with liberty to add parties, it has been expressly directed, that they should be added by supplemental bill; (*s*) though, as we have before seen, even the ordinary direction on such occasion, that the plaintiff shall be at liberty to add parties by amendment, has been held to authorize the filing of a supplemental bill for that purpose. (*t*) A supplemental bill may also be filed, for the purpose of bringing before the Court a party who was out of the jurisdiction when the orignal bill was filed, and who has since returned, in cases where it cannot be done by amendment. (*u*)

It may be mentioned here, that, were a bill was filed on behalf of a great number of plaintiffs interested in an annuity, to recover the arrears, &c., and after the cause was at issue, and witnesses had been examined, it was discovered that one of the plaintiffs in whose name the bill was exhibited, had died before the filing of the bill; a supplemental bill was filed by the existing plaintiffs, and the representative of the deceased plaintiff, against the defendants, praying
[*156] to have the same benefit *of the proceedings in the original suit, that they would have been entitled to, had the plaintiff, who was dead, been alive when the bill was filed, and the decree was made in both suits. (*y*)

A supplemental bill, for the purpose of adding new matter, or for bringing new parties before the Court, may also be filed after, as well as before, the

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(*o*) 3 Bro. C. C. 598; and *vide ante*, vol. 1, 512, note (*h*).
(*p*) 1 R. & M. 191; and *ante ubi supra*. (*q*) *Vide ante*, vol. 1, p. 511.
(*r*) 5 Russ. 42; *vide etiam* Sadler v. Lovett, 1 Moll. 162.
(*s*) Jones v. Jones, 3 Atk. 110.
(*t*) Greenwood v. Atkinson, 5 Sim. 419; *ante* vol. 1, p. 393.
(*u*) *Ante*, vol. 1, 269.
(*y*) Delfosse v. Crawshaw, MSS. Rolls, 12 November, 1834.

decree; thus where a defendant appealed from a decree of the Master of the Rolls, but before it was brought on, the plaintiff apprehending, that he had not proper parties before the Court, when the decree was pronounced, to enable him to carry it into effect, filed a supplemental bill, for the purpose of bringing the necessary parties before the Court; to this supplemental bill the defendant demurred, but the demurrer was over-ruled. (*z*)

So also, where, in consequence of the parties claiming the property in question, being some of a class, the Court refers it to the Master, to inquire who the individuals of the class are; and it turns out, upon the Master's report, that some of them are not before the Court, the plaintiff must file a supplemental bill, for the purpose of bringing them before the Court, before a final decision can be made. (*a*)

In like manner a party in a bill for an account, may, after a decree to account, file a supplemental bill for the discovery of more evidence touching the account; and where, to such a bill, the defendant pleaded the former bill, and that the cause was heard, and an account directed, he was ordered to answer to all matters in the supplemental bill not answered unto in the former case, but the plaintiff was not to reply or proceed any farther without order. (*b*) A supplemental bill, however, will not lie after a decree for account, for the mere purpose of stating additional facts which arose before the filing of the original bill, and of praying that such matters may be taken into consideration in the account decreed to be taken. (*c*)

*A supplemental bill may, likewise, be filed after a decree, for [*157] the purpose of enabling the Court to give directions, which were not prayed by the original bill, but which the result of the proceedings under the decree have rendered proper. This was held by Lord Hardwicke in *Dormer* v. *Fortescue*. (*d*) In that case the plaintiff filed his bill for a discovery of a deed under which he claimed, and that the same might be deposited for safe custody and produced at a trial at law, *and for general relief*. At the hearing, the deed was ordered to be deposited, &c., till after the trial at law. The plaintiff having been successful at law, applied, when the cause came on for further directions, for an account of the rents and profits from the time his title accrued, which was resisted on the ground that the bill did not specifically pray an account of rents and profits but only general relief; but Lord Hardwicke held that, under the prayer for general relief, the plaintiff was entitled to the account; his Lordship, however, added, "But suppose the original bill to be as defective as the defendant's counsel would have it to be, could any thing be more proper than to bring a supplemental bill to put this matter in issue and supply the defects, if any, in the original bill? Supplemental bills are often brought in aid of a decree of this Court, as in a decree to account, for want of full directions before: and directions are given, under the supplemental bill, that the new matter should be connected with the former decree." His Lordship expressed his opinion to be, that if the bill had not prayed this general relief, a supplemental bill would have been very proper, that he might have entire relief, and that they ought to be considered as one bill and connected together. (*e*) And here it may be mentioned, that although, in general, where, upon an injunction to restrain a piracy being dissolved, with liberty to the plaintiff to bring an action, upon the defendant's undertaking to keep an account of

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(*z*) Woodward v. Woodward, 1 Dick. 33. (*a*) *Ante*, vol. 1, 309.

(*b*) Boeve v. Shipwith, 1 Eq. Ca. Ab. 80; 2 Ch. Rep. 142.

(*c*) Swan v. Swan, 8 Price, 518. The plaintiff should, in such case, file a supplemental bill in the nature of a bill of review supported by the usual affidavit, and apply to have the cause reheard.

(*d*) 3 Atk. 124. (*e*) Ibid.

the books sold, if the verdict is in favour of the plaintiff, the Court will, upon the hearing, under the prayer for general relief, direct an account against the defendant, without a supplemental bill, yet this is only where the plaintiff was [*158] in a situation to pray an account when the *bill was filed; if that is not the case, and the plaintiff's right to the account was only consequent upon the defendant's undertaking to keep one, there must be a supplemental bill. (*f*) So also, if the original bill has omitted to put in issue material matter, as where a bill charged a forgery in a lease and prayed to be relieved against it, but, by way of inducement only, mentioned that there were fraudulent circumstances attending the case, without making a charge of fraud distinct from the charge of forgery, or bringing before the Court the trustees, who were parties to the lease, and to whom the fraud was imputed, and a decree was made directing an issue to try the forgery, which the plaintiff failed in establishing,—when the cause came on again for further directions, the plaintiff sought to establish the case of fraud, which was objected to, because the fraud had not been distinctly charged in the bill, and Lord Hardwicke allowed the cause to stand over, (the plaintiff paying the costs of the day,) and permitted the plaintiff to bring a supplemental bill for the purpose of charging the fraud, and making the trustees parties. (*g*)

A supplemental bill has also been permitted where, after a decree against executors to account, it has been found that, in the lifetime of the testator, an account existed between the testator and one of the executors, in respect of a partnership between them, upon which a balance was claimed to be due from the executor to the estate. (*h*)

It may be mentioned here, that, in cases of this description, where the decree had directed the Master to take the accounts in the usual manner, but contained no specific direction to inquire into the fact whether the executor was or was not a partner with the testator, or to take account of any such partnership, Sir [*159] John Leach considered the Masters hardly warranted *in refusing to take the partnership accounts, the order being to take all accounts; and, upon the petition of the executor, he directed a reference to the Master, to inquire whether the petitioner was a partner with the testator, and, if he should find him to have been a partner, then the Master was to take the accounts of the partnership, the petitioner to pay the costs of the petition, and to take the inquiry at his own expense. (*i*)

A supplemental bill, after a decree, however, must be strictly in aid of that which the Court has already done, (*k*) it cannot be filed for the purpose of introducing a completely new case, still less can it be maintained for the purpose of adding to the decree what, upon the hearing, the Court has excluded from it; thus, where a bill had been originally filed against executors for an account of their testator's estate, in which certain accounts, alleged to have been fraudulently settled between the defendants and a deceased co-executor, were impeached, but the decree, in consequence of its being discovered at the hearing, that the representative of the deceased co-executor was not before the Court, was restricted to taking the accounts of the surviving executors, and directed that the

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(*f*) *Vide* Barfield v. Kelly, 4 Russ. 355. Formerly, in the Court of Exchequer, upon a bill for tithes, the account was confined to the time of filing the original bill, and a new suit was necessary in respect of tithes subsequently accrued; but general convenience has since relaxed this rule in matters of account in all Courts of Equity, and accounts may now be taken under a general decree for an account down to the time of the report, without any supplemental bill, ibid.; and *vide ante*, vol. 2, p. 889.

(*g*) Jones v. Jones, 3 Atk. 110.

(*h*) Cropper v. Knapman, 2 Y. & C. 338; and *vide* Simmons v. Gutteridge, 13 Ves. 262.

(*i*) Woolly v. Gordon, Taml. 11. (*k*) Wilson v. Todd, 1 M. & C. 42, 47.

account with the deceased executor should not be disturbed. Upon the plaintiff afterwards filing a supplemental bill, for the purpose of bringing before the Court the representative of the deceased executor, and the assignees of one of the surviving executors who had since become bankrupt, which prayed that the accounts and legacies directed by the former decree might be prosecuted, and that an account might also be taken of the receipts of the deceased executor, it was held, on the demurrer of the assignees of the deceased executor, that the suit for the last mentioned purpose was irregular, inasmuch as the plaintiff had no right to insist upon taking accounts which the original decree had declared should not be taken. (*l*)

It is to be noticed, that, in the last case, there was an express direction in the original decree, that the accounts settled with the deceased executor should not be disturbed; it is not necessary, however, that where a point has been expressly *raised, and put in issue in the original suit, it should be specifically noticed in the decree, in order to preclude the plaintiff from agitating it, again, by a supplemental bill; therefore, where the original bill made a case for inquiry as to equitable waste, so that the plaintiff had enjoyed an opportunity of supporting that case by evidence, which he had omitted to avail himself of, he was held not to be entitled to raise the question anew in a supplemental or other suit, although the bill as to that equity had not been dismissed by the decree. (*m*) [*160]

It has been already stated, (*n*) that facts occurring since the filing of the original bill, cannot, properly, unless under peculiar circumstances, (*o*) be brought before the Court by amendment, such matters must, therefore, be introduced by supplemental bill. It is, however, to be observed, that it is not every relevant event happening posterior to a bill, that renders a supplemental bill admissible, (*p*) such events must also be material; and therefore, in a suit for an account, where there is no alteration in the interest of the parties, nor any particular circumstances requiring further discovery, but only a fact has occurred, which may be proved on taking the account prayed by the original bill, and the relief is not varied by the supplemental matter, but the plaintiff might have the relief prayed for by such bill, under the original bill, a supplemental bill is improper, and may be demurred to. (*q*)

If, after a suit has been instituted, any circumstance occurs which, without abating the suit, occasions an alteration in the interest of any of the parties, or renders it necessary that new parties should be brought before the Court, the proper method of doing it is by supplemental bill. (*r*) Thus if, pending a suit affecting an estate which is the subject of an entail, a tenant in tail, whose interests are likely to be affected by it, comes into *esse*, he must be brought before the Court by a supplemental bill. (*s*) So, in a suit relating to *the personal property of a married woman, where a decree or order has directed the Master to approve of a settlement on the wife and her children, but before the Master makes his report the wife dies, it has been held, that the children have a right to the benefit of the settlement, and to assert that right by supplemental bill. (*rr*) [*161]

(*l*) Ibid.

(*m*) Newdigate v. Newdigate, 8 Bligh, N. S. 374.

(*n*) Vol. 1, 510.

(*o*) What subsequent facts may be introduced by amendment of the original bill are stated, vol. 1, 511.

(*p*) Milner v. Lord Harewood, 17 Ves. 144. (*q*) Adams v. Dowding, 2 Mad. 53.

(*r*) Jones v. Jones, 3 Atk. 217. (*s*) Lord Red. 49.

(*rr*) Groves v. Clarke, 1 Keen. 132; Murray v. Lord Elibank, 10 Ves. 84; and *vide ante*, vol. 1, p. 145.

The reader may also be reminded, in this place, that where a bill has been exhibited against a man and his wife, and the husband dies, pending the suit, and a new interest thereupon arises to the wife, a supplemental bill ought to be filed for the purpose of giving the wife an opportunity of putting in another defence in respect of her newly acquired interest. (*s*)

It is a general rule, that whenever an event happens subsequent to the filing of the original bill, which, without abating the suit, transfers the interest of a party to the suit, or any portion of it, to another, so as to give a *new interest* to the person to whom it is transferred, the defect thus occasioned must be supplied by supplemental bill. (*t*) But such bill, though it is supplemental in respect to the old parties and the rest of the suit, yet, as to any new party brought before the Court by it, and consequently, in regard to its immediate operation, has in some degree the effect of an original bill. (*u*)

If a plaintiff, suing in his own right, make such an alienation of his property as to give the alienee an interest in the subject matter of the suit, but not at the same time to deprive himself of all right in the question, he must bring the alienee before the Court by supplemental bill, or the alienee may himself file a supplemental bill, against the original plaintiff and the other parties to the suit, to have the benefit of the proceedings. This appears to have been the course pursued in *Binks* v. *Binks*. (*x*) In that case, a bill was filed by a creditor against Lord Rokeby and the trustees under a deed, executed by him, by which certain property was vested in the trustees to sell, and, out of the proceeds, to pay certain debts due by Lord Rokeby, *and the surplus to Lord Rokeby himself: a decree was made at the Rolls, in 1811, directing an account of the debts and a sale of the property, &c., by the Master; but, after the Master's report had been made and confirmed, it was discovered that the plaintiff had, in March, 1810, assigned all his interest in the debt of Lord Rokeby to other trustees in trust to recover that debt, and to apply the amount in payment of certain scheduled debts of his, the plaintiff's own, and the surplus to the plaintiff. Upon this discovery a supplemental bill was filed by the trustees, under the plaintiff's deed, to have the benefit of the suit instituted by the plaintiff, and, on the hearing of the supplemental suit, it was decreed that the former decree should be carried on and prosecuted between the present parties in the same manner as the same were directed to be carried on by the original parties.

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In like manner, if a plaintiff, suing in his own right, is entirely deprived of his interest, but is not the sole plaintiff, the defect, arising from this event, may be supplied by a bill of this kind. (*y*) Therefore if, after the bill filed, one of several plaintiffs totally alienates his right in the subject matter, or becomes bankrupt, so that his interest becomes vested in his assignees, a supplemental bill may be filed by the remaining plaintiffs, either against or in conjunction with the alienee or assignees, to carry on the suit.

Upon the same principle it is held that, if a plaintiff becomes a lunatic, a supplemental bill may be filed in the joint names of the lunatic and his committee; (*z*) or if, after the institution of the suit by a lunatic and his committee, the committee dies and a new committee is appointed, the suit may be continued by a supplemental suit on behalf of the lunatic and his new committee.

It is to be recollected here, that a voluntary alienation, *pendente lite*, is not permitted to affect the rights of the other parties, if the suit proceeds without disclosure of the fact, except as the alienation may disable the party from per-

(*s*) *Vide ante*, vol. 1, p. 218.
(*t*) Lord Red. 51; Cooper's Eq. Pl. 75.
(*u*) Ibid.
(*x*) 2 Bligh, 593.
(*y*) Ld. Red. 50.
(*z*) *Ante*, vol. 1, p. 116.

forming the decree of the Court, as in the case of an assignment by a mortgagee of his interest in the mortgage, pending a suit to *redeem, in which [*163] case the assignee must be brought before the Court by supplemental bill. (a) It sometimes, however, happens, that, pending a suit, an alienation by some of the parties takes place without the parties conducting the suit being aware of the fact, or thinking it necessary to bring the alienee before the Court. In such case, unless the alienee can be protected by the ordinary course of petitioning for an order that the alienor may not take the fund he is entitled to in the suit out of Court without notice to him, he, the alienee, may make himself a party to the suit by supplemental bill against the other parties. (b) This is generally necessary wherever the alienee wishes to attend the Master under a decree, though it seems that, even in such cases, the Court will, upon application, give permission to the purchaser, *pendente lite*, of the interest of a party, to attend the Master, without filing a supplemental bill to establish his right, provided the order is qualified so as not to prevent the plaintiff from having any remedies he might be entitled to against the purchaser. The order in such case must be at the expense of the purchaser. (c)

If the interest of a plaintiff, suing in *autre droit*, entirely determines by death or otherwise, and some other person thereupon becomes entitled to the same property under the same title, as in the case of an executor or administrator upon the determination of an administration *durante minori ætate*, (d) or *pendente lite*; (e) the suit may, likewise, be added to or continued by supplemental bill. (f) The rule is the same if the committee of a lunatic's or idiot's estate die after the commencement of a suit, and a new committee is appointed in his stead. (g)

*Formerly the rule was the same in cases of bankruptcy or insol- [*164] vency; in which case if an assignee or assignees died, or were removed pending a suit, and a new assignee or new assignees were appointed, a supplemental bill was necessary; but, by recent enactments the necessity for a supplemental bill, in such cases, has been obviated. (h)

It is to be remarked that, in the cases above put, viz: of those which effect only a partial change in the interest of the plaintiffs, or of one of the plaintiffs, the parties to the suit are still, to a certain extent, able to proceed with it, though from the effect of the change of interest, occasioned by the subsequent event, the proceedings are not sufficient to attain their full object: also, that, in the case of the death of the party suing in *autre droit*, if the suit is continued by the individual succeeding to the character of the deceased plaintiff, there is no change of interest which can affect the parties, but only a change of the person in whose name the suit must be prosecuted. (i) The case, however, is different where a sole plaintiff, suing in his own right, is deprived of his whole right in the matters in question by an event subsequent to the institution of the suit, as in the case of a bankrupt or insolvent debtor, whose whole property is transferred to assignees; or, in case such a plaintiff assigns his whole interest to

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(a) Lord Red. 58. (b) Foster v. Deacon, Mad. & Geld. 59.
(c) Toosey v. Burchell, Jac. 159.
(d) Jones v. Basset, Prec. in Ch. 174; Stubbs v. Leigh, 1 Cox. 133.
(e) Ld. Red. 50.
(f) Ibid. It has been held, that, where a plaintiff sues as personal representative and the representation is determined by death, a subsequent administrator *de bonis non* has been permitted to obtain the benefit of the former proceedings by revivor, and need not file a supplemental bill; Lord Red. 50, (n); Owen v. Curzon, 2 Vern. 237; Huggins v. York Buildings Comp. 2 Eq. Ca. Ab. 3; *vide post*, Sect. III, p. 200.
(g) *Ante*, vol. 1, p. 116. (h) *Vide ante*, vol. 1, pp. 85 & 86.
(i) Ld. Red. 51.

another, then the plaintiff, being no longer able to prosecute for want of interest, and his assignee claiming by a title which may be litigated, the benefit of the proceedings cannot be obtained by him by means of a supplemental bill, but must be sought by *an original bill in the nature of a supplemental bill.* (*k*) This distinction may, at first sight, appear artificial, but it is attended by a considerable difference in its practical results; for in those cases in which a supplemental bill only is filed, if there has been no decree, the suit may proceed after the supplemental bill has been filed, in the same manner as if the original plaintiff had continued such, except that the defendants must answer the supplemental bill, and either admit or put in issue the title of the new plaintiff: (*l*)

[*165] but, in the case of an original *bill, in the nature of a supplemental bill, the whole case is open: a new defence may be made, the pleadings and depositions cannot be made use of in the same manner as if filed or taken in the same cause, and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the Court to make a similar decree; (*m*) whilst in the case of a mere supplemental suit, the benefit of the original decree, if obtained, is expressly given to the new plaintiff by the supplementary decree, and he is declared entitled to stand in the place of the plaintiff in the original bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and take the steps necessary to render it effectual. (*n*)

The distinction between cases in which, upon an alienation by a sole plaintiff, pending a suit, a supplemental bill will be sufficient, and those in which an original bill in the nature of a supplemental bill will be proper, may be aptly illustrated by the case of *Binks* v. *Binks*, before referred to. (*o*) In that case, as we have seen, a creditor filed his bill for a sale, under a trust deed; and, pending the suit, he so far aliened his own claim, that he gave another party an interest in it,—that is, he assigned it to trustees to pay debts of his own, reserving the surplus for himself; (*p*) his assignees, therefore, were held entitled to file a supplemental bill, to obtain the benefit of the decree which he had obtained: if he had not reserved any right in the surplus to himself, his assignees could not have proceeded by supplemental bill merely, but must have filed an original bill in the nature of a supplemental bill. The case would have been the same, if, instead of assigning to trustees for creditors, he had become bankrupt or insolvent; because, although in the case of bankruptcy, the bankrupt is entitled to the surplus, the theory of bankruptcy is, that a party is a bankrupt because he cannot pay his debts; and the *primâ facie* intendment, therefore, is that he has no property. (*q*)

It may be noticed here, that the rule which requires a bill in the nature of a supplemental bill, and not a mere supplemental bill, to be filed in a case where

[*166] interest of a sole plaintiff *is determined and transmitted to another, *pendente lite*, applies only to cases in which the party has become entitled to the interest of the original plaintiff by a separate independent title; it does not apply where the new party comes in by the same title as the original plaintiff; as in the case of a tenant in tail succeeding to a title to sue in equity, upon the death of a preceding tenant in tail; in which case he may proceed by supplemental bill, by way of continuation of the original suit: (*r*) nor does it appear to make any difference, provided he comes in under the same title, that he comes in by force of a new limitation in remainder, upon the determination of a preceding estate tail: he will, in such case, be entitled to continue

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(*k*) Ibid.; *et vide post*, Sect. II.
(*l*) Ibid.
(*m*) Lord Red. 57.
(*n*) Ibid. 51.
(*o*) *Ante*, p. 161.
(*p*) *Vide* 2 Bligh, 581.
(*q*) *Vide ante*, vol. 1, p. 71.
(*r*) Lloyd v. Johnes, 9 Ves. 37.

the suit in the same manner as a tenant in tail coming in by succession as issue in tail. (*s*)

This point was much discussed by Lord Eldon, in his judgment in the case referred to, of *Lloyd* v. *Johnes*; (*t*) in that case, the original bill had been filed by a tenant in tail, who died after the cause was at issue, but before any witnesses were examined; whereupon the present plaintiff, who claimed the estate in question under the same settlement, (as the issue of a tenant in tail in remainder expectant upon the decease of the former tenant in tail without issue,) filed a supplemental bill to have the benefit of the former suit and proceedings, &c. The defendants answered the supplemental bill, referring to their answer to the original bill; but upon the hearing of the cause, an objection was made to reading the evidence taken on the part of the plaintiff in the supplemental suit, on the ground that the facts in issue by the original bill, were not put in issue by the supplemental bill, and that the plaintiff's course of proceeding ought, therefore, to have been by original bill in the nature of a supplemental bill, by which all the facts stated in the original bill would have been put in issue, whereas the only fact put in issue, by the supplemental bill, was whether the original bill was filed by the former plaintiff.

Lord Eldon pronounced a very elaborate judgment upon the case, the result of which was, that the supplemental *bill, as filed, might be maintained, and that the facts in the original bill were sufficiently in issue [*167] to warrant the reading of the evidence taken in the supplemental suit; his Lordship's opinion being, that, inasmuch as upon a bill claiming a charge upon the whole inheritance, in strict settlement, against the first tenant in tail in being, it is the practice, if he dies without issue, to give the plaintiff all the benefit of the proceedings against the next tenant in tail in remainder by supplemental bill, the same principle which is applied against the second tenant in tail must be applied in his favour. (*u*)

His Lordship appears also to have held, upon the same occasion, that if, in the original suit, witnesses had been examined before the death of the first tenant in tail, whether *de bene esse* or *in chief*, the benefit of their testimony might be had in the supplemental suit. (*x*)

So also, in the case of an answer, his Lordship appeared to think, that the plaintiff in the supplemental suit might read the answer of the defendant to the original bill, "subject always to this, that when the tenant in tail takes a different interest, or rather a similar interest, not affected by the same circumstances, it is competent, both for and against him, to bring forward the equities belonging to those different circumstances as contradistinguishing his case;"—"the difference between the issue in tail, heir, or devisee, and a remainder man claiming by force of a new limitation, is that, in the latter case, he is not bound by the shape of the defence." (*y*) "It follows," says his Lordship, in a subsequent passage, "that if any advantage arises to the tenant in tail taking up the cause, he will have a right to say his interest was represented, and that he will continue it. It saves expense; and may be of advantage to both,—to the plaintiff as giving him the benefit of admission; to the defendant as giving him the advantage of any statement in the bill. If the plaintiff sues as by a continuation of the suit, there is no injustice in pressing against him the advantage of the statement in the bill which he adopts; for neither plaintiff nor defendant is shut out from *stating particular circumstances attaching upon his case: *Wingfield* v. *Whaley* (*z*) is an authority, that these cir- [*168]

(*s*) Ibid.
(*t*) *Ubi supra.*
(*u*) 9 Ves. 60.
(*x*) Ibid. 59.
(*y*) Ibid.
(*z*) 2 Bro. P. C. 447

cumstances may be brought before the Court by answer or fresh examination of witnesses." (*a*)

The reason assigned by Lord Eldon, in the above cause, for allowing the remainder man in tail to continue a suit commenced by a former tenant in tail, is, the great hardship which must result to a person so situated, if he be not permitted to take that course: for as a Court of Equity, for the convenience of justice, in many cases, considers a tenant in tail as having the whole estate vested in him, at least for the purposes of the suit, and does not look beyond the estate tail in a suit aiming by the decree to bind the right to the land, the subsequent remainder man has a clear interest in the event of a suit of the prior tenant in tail, and it would be a great injustice to deprive him of any benefit which might result from a suit, by which, if unfavourable, his interests would be bound. "I apprehend," says his Lordship, "that a Court of Equity would, in many cases—not all—admit a plea of dismissal upon the merits, to bar a remainder man in tail of a new estate tail, under the same gift, as well as a person claiming the same estate. I admit there is no judgment in point; but the justice of the Court furnishes this as a principle, that it is of absolute necessity, when once it is said that the tenant in tail shall represent the inheritance, that those who represent the inheritance shall, in this Court, have the benefit and advantage of a proceeding by him."

From the above observations it is to be collected, that it is only on the ground that a tenant in tail is supposed to represent the inheritance and the interests of all those claiming in remainder after him, that a remainder man coming in after the determination of the estate tail of the first plaintiff, is permitted to carry on the same suit by mere supplemental bill, instead of being driven to his original bill; when, therefore, this ground fails, and the estate of the original plaintiff [*169] was less than an estate tail, *e. g.*, an estate for life, a person coming in *upon a remainder, on the determination of such prior estate, cannot continue the suit, but must commence *de novo*, by original bill, in the nature of a supplemental bill; and the reason of this is obvious, when it is considered, that depositions taken in a cause against the original plaintiff having a less interest than an estate tail, cannot be read against a remainder man, (*c*) and it is therefore necessary, in order to give the defendants an opportunity of bringing forward evidence against the new plaintiff, that they should have an opportunity of examining their witnesses *de novo*.

It is somewhat singular, that the noble and learned author of the treatise on pleadings in the Court of Chancery, does not advert to the distinction, in this respect, between suits originally commenced by a tenant in tail, and suits commenced by a tenant for life. In pointing out the cases in which an original bill in the nature of a supplemental bill will be proper, his Lordship says, that, in the case of a remainder man in a settlement becoming entitled, upon the death of *a prior tenant* under the same settlement, the suit cannot be maintained by bill of revivor, nor can its defects be supplied by supplemental bill. (*d*) His

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(*a*) Lloyd v. Johnes, *ubi supra*. (*b*) Ibid. 57.

(*c*) *Ante*, vol. 2, p. 429.

(*d*) Ld. Red. 56. It is remarkable that the case referred to, by his Lordship, in support of his proposition, is one which, if it bears at all upon the point, is, as far as it affects the question in discussion, of a contrary tendency. The case is Osborne v. Usher, which occurs in the original edition of Mr. Brown's Parliamentary Cases, at vol. 2, p. 314, but will be found in Mr. Tomlin's edition, at vol. 6, p. 20. The short abstract, at the head of the case, is—"*Where a suit abates by the death of the plaintiff, a person claiming by provision*, or per formam doni, *and not as heir or representative of the deceased plaintiff, cannot revive, but must bring his original bill, or commence an action at law.*" The same construction is put upon the case in 2 Eq. Ca. Ab. 3, *margin*, and in 4 Viner's Ab. p. 432, Ca. 17; but upon referring to the report of the case itself, it will be found that the question, whether

Lordship, although "provoked to *accuracy upon this subject," (*e*) [*170] is evidently, in the passage, at present under consideration, directing his attention more to the distinction between original bills, in the nature of bills of revivor, and original bills in the nature of supplemental bills, than to the difference between the latter and mere supplemental bills. However, there can be no doubt that, as applied to suits by tenants for life, a mere supplemental bill by a remainder man, will not be sufficient to give such remainder man the benefit of the former proceedings, but that his course must be to file an original bill in the nature of a supplemental bill. So also must an ecclesiastical person succeeding to a benefice, if he wishes to obtain the benefit of proceedings instituted by his predecessor. (*ee*)

It is to be observed, that it is only in those cases where the remainder man comes in upon the same title as the former plaintiff, that he will be permitted to sustain a supplemental suit. In *Lloyd* v. *Johnes*, (*f*) which has been already so frequently referred to, Lord Eldon says:—"I distinguish between cases where the suit is founded on contract by the tenant in tail, and a suit to bind the land in respect of charges created by the author of the gift;" and, in *Tonkin* v. *Lethbridge*, (*g*) his Lordship has determined, that another title accruing since the filing of the original bill, will not enable even the same person to carry on a suit by supplemental bill, in a case where the title upon which he originally proceeded had failed.

The same principle which applies to suits *by* a tenant in tail, applies where the suit is *against* him; and, therefore, if a bill claims a charge upon the whole inheritance in strict settlement, and the first tenant in tail in being is made a party defendant, and he dies without issue,—according to the constant practice, all the proceedings may be had against the second tenant in tail, as if he had been originally a party, by means of a supplemental *bill. (*h*) So [*171] also, where a bill is filed for the purpose of raising a charge against the inheritance, divided into estates tail against a remote remainder man, those intermediate not being yet *in esse;* if, after the cause has proceeded to a certain length, an intermediate remainder man comes *into esse*, the course is to file a supplemental bill against him, stating the former proceedings, and such statement is held sufficient to put the facts originally in issue,—in issue with regard to such defendant; and he may even have the benefit of the depositions of any witnesses that may have been already examined, if the witnesses should die. (*i*) The rule in this case, as applied to a defendant, is subjected to the same qualification that it is subject to where the tenant in tail is plaintiff, viz: that where

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a person claiming in remainder might revive the suit, did not arise, but that the question was, whether such a person could appeal from a decision made against a former tenant in tail claiming under the same ancestor, and that the House determined in favour of his right to appeal, although it afterwards dismissed the appeal, upon the merits, with costs. This mistake has probably arisen from the person who made the statement, at the head of the case, having adverted to the order affirming the appeal, without noticing that there had been a prior determination of the House upon the right to appeal. Wingfield v. Whaley, 2 Bro. P. C. 447; ibid. Toml. ed. vol. 1, p. 200. The other case, referred to by Lord Redesdale, certainly establishes the proposition that, in the case put, a bill of revivor will not lie, but it goes a great way in establishing the proposition, that a remainder man may have the benefit of proceedings against a tenant in tail. 9 Ves. 57.

(*e*) *Vide* 9 Ves. 58. (*ee*) Ld. Red. 56.

(*f*) 9 Ves. 57.

(*g*) Cooper's Rep. 43; *vide etiam* Pritchard v. Draper, 1 R. & M. 191, and Davidson v. Foley, 3 Bro. C. C. 598, and *ante*, 153.

(*h*) Lloyd v. Johnes, 9 Ves. 58.

(*i*) Ibid. 60. *Query*, whether the death of the witnesses is, in such case, necessary to entitle the new defendants to the benefit of their depositions?

a tenant in tail takes a different interest, or rather a similar interest not affected by the same circumstances, it is competent, both for and against him, to bring forward the equities belonging to those different circumstances, as contradistinguishing his case. (*k*)

The reader is to be reminded, in this place, that when there is a decree against a tenant in tail, and he dies without issue, a subsequent remainder man may appeal from the decree; for which purpose, however, he must make himself a party to the original suit by supplemental bill, praying to have the benefit of the proceedings, for the purpose of appealing from the decree. (*l*)

It is said that, if by any event, the whole interest of a defendant is entirely determined, and the property is become vested in another, by a title not derived from the former party, as in the case of succession to a bishopric or benefice, or of the determination of an estate tail, and the vesting of a subsequent remainder in possession, (*m*) the benefit of the suit against the person becoming entitled by the event described, must also be obtained by original bill, in the nature of a supplemental bill; though if the defendant, whose interest is thus [*172] *determined, is not the sole defendant, the new bill is supplemental as to the rest of the suit, and is so termed and considered. (*n*)

This rule, however, is only applicable when the estate or interest of the defendant is actually determined and a new estate or interest accrues to another party. Where the estate or interest of the defendant is not determined, but only becomes vested in another, by an event subsequent to the institution of the suit; as in the case of bankruptcy or insolvency, (*o*) or of alienation by deed, (*p*) the defect in the suit may be supplied by supplemental bill, whether the suit is become defective merely, or abated as well as defective.

The same rule also applies to cases where the interest of a person sued in *autre droit*, is determined pending the suit, as in the case of an administration *durante minori ætate* or *ad litem*, or of an executor *pendente lite*. It will also, as it seems, notwithstanding the Stat. 6, Geo. 4, c. 16, s. 7, and 7 Geo. 4, c. 57, apply to the case of assignees of bankrupts or insolvent debtors dying or removed, after the suit commenced. (*q*)

It is to be observed that, till the appearance of a defendant to the bill, there is, strictly speaking, no cause in Court as against that defendant; therefore, if the interest of a defendant, named as a party to the original bill, should determine before such defendant should have appeared, the suit cannot be continued, against the person in whom his interest has become vested, by a mere supplemental bill; but an original bill in the nature of a supplemental bill must be filed, which, although merely supplemental against the other defendants, must pray that the new party may answer the original bill as well as the supplemental matter, and pray distinct relief, to which the plaintiff may consider himself entitled against the new defendants. (*r*)

(*k*) Ibid.

(*l*) Giffard v. Hort, 1 Sch. & Lef. 386, 410.

(*m*) This must be understood upon the principles laid down in Lloyd v. Johnes, *ubi supra*, to apply to those cases only, in which the inheritance has not already been represented, *vide ante*, p. 168.

(*n*) Lord Red. 53.

(*o*) *Ante*, vol. 1, p. 254.

(*p*) It is to be recollected, that with respect to purchasers or incumbrancers incurring such after the bill filed, they will be bound by the decree, whether the plaintiff have notice of them or not; and, therefore, they need not be brought before the Court by supplemental bill, unless the legal estate has become vested in them, of which it is necessary to procure a conveyance. *Ante*, vol. 1, 376.

(*q*) *Vide ante*, vol. 1, p. 254.

(*r*) Asbee v. Shipley, Mad. & Geld. 296; *vide etiam* Crowfoot v. Mander, 9 Sim. 396; Stewart v. Nicholls, 1 Taml. 307.

*It may also be observed, that where, after a decree, a defendant becomes bankrupt, his assignees cannot, by petition, obtain leave [*173] to go before the Master, upon taking the account under the decree; they must either wait till the plaintiff brings them before the Court by supplemental bill, or file a supplemental bill themselves; but it may be mentioned, that in *Philipps* v. *Clark*, (*s*) the Vice Chancellor has determined that, after a decree, the assignee of a defendant, although he may, in case of the plaintiff's omission, bring himself before the Court by supplemental bill, yet, as the plaintiff is entitled to the conduct of his own case, he cannot do so, without previously applying to the plaintiff to file a supplemental bill. In that case, the assignee of an insolvent defendant, without any previous application, filed a supplemental bill, and afterwards the plaintiff filed one, and moved that the assignee's bill might be taken off the file for irregularity, which was ordered; the Vice Chancellor distinguishing a supplemental bill, in such a case, from a bill of revivor after a decree, which may be filed by a defendant without notice to the plaintiff; as the effect of such a bill, is not to take the conduct of the suit out of the hands of the plaintiff, but merely to place the proceedings in the same state that they were in at the time of the abatement. (*t*)

This brings us to the consideration of another case, in which a supplemental bill is frequently resorted to, viz: where in a suit instituted by a creditor, on behalf of himself and other creditors, of a person deceased, the creditor who files the bill dies, and his representative omits to continue the suit after decree; in such case it is almost a matter of course, to permit another creditor, who has come in under the decree and established his claim as creditor before the Master, to take up the proceedings by supplemental bill. (*u*)

*It is to be observed, however, that as the representative of the deceased creditor has an interest in the prosecution of the suit, in [*174] respect of the costs already incurred in it, no other creditor is at liberty to file a supplemental bill, without notice to such representative; and that the proper course is, for the creditor desiring to prosecute the suit, to move that he may be at liberty to file a supplemental bill, if the representative of the deceased plaintiff do not revive within a limited time, and to serve such order upon the representative. (*x*)

It seems, from the statement of the facts in *Houlditch* v. *the Marquis of Donnegall*, (*y*) that the motion for leave to file the supplemental bill was made upon notice, served both upon the representatives of the former plaintiffs, and upon the defendant; and that it was held, that if the defendant had any objection to urge to the supplemental bill being filed, he should have taken that opportunity of stating it to the Court, and should not have waited to do so till he put in his answer to the supplemental bill.

In that case, the objections taken by the defendant's answer, were founded on the delay which had taken place, and the fact that the validity of the debentures, under which the plaintiffs claimed, were in issue in another suit instituted

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(*s*) 7 Sim. 231.

(*t*) Livesey v. Livesey, 1 R. & M. 10; and *vide post*, sect. 3.

(*u*) Houlditch v. Marquis Donnegall, 1 S. & S. 491; Dixon v. Wyatt, 4 Mad. 392. Some doubt appears to be thrown upon this, by a passage in Lord Redesdale's treatise, (p. 63,) in which he says, in case of a bill by creditors, on behalf of themselves and other creditors, any creditor is entitled to revive, from which it may be inferred, that a bill of revivor and not a supplemental bill, is the proper form of proceeding to be adopted; the practice, however, seems to be in favour of a supplemental bill; Dixon v. Wyatt; Houlditch v. Marquis Donnegall, *ubi supra*; *sed vide* Pitt v. the creditors of the Duke of Richmond, 1 Eq. Ca. Ab. 3, pl. 7.

(*x*) Dixon v. Wyatt, 4 Mad. 392. (*y*) *Ubi supra.*

in Ireland, by the plaintiffs themselves, and these objections were urged at the hearing of the supplemental suit; but the Vice Chancellor, Sir J. Leach, held, that although, upon the second ground, he should have hesitated very much before he made the order giving the plaintiffs liberty to file a supplemental bill, yet, as the order had been made, and the bill filed, the plaintiffs were entitled to have the same benefit of the proceedings in the original suit, as the representatives of the original plaintiff would have had, if they had proceeded by bill of revivor. (*z*)

[*175] *A supplemental bill should state the original bill and the proceedings thereon. Some doubt appears to exist with regard to the limits within which the statement of the original bill ought, in general, to be confined. Sir Anthony Hart, in his judgment, in *Onge* v. *Truelock*, (*a*) says—"I am not an advocate for very great strictness in pleading, but I remember a case, in which Lord Eldon decided that a plaintiff filing a supplemental bill, had no right to repeat any thing of his original statement, or do more with reference to that, than merely to state the decree, if there had been a decree; and if before decree, no more than the prayer of the bill. In that case, on a reference for impertinence, the pleader having infused a short re-statement, Master Cox reported that the supplemental bill was not impertinent; but Lord Eldon, on hearing objections argued, ordered all that re-statement to be expunged, and nothing retained but the prayer of the original bill, and plaintiff to pay the costs." His Lordship added, "I remember, it was just at the time of the great clamour against the length of equity pleadings, and I confess, I thought Lord Eldon had yielded to that clamour somewhat at the time, and that he was wrong, because it was a very concise re-statement in that instance; but I have since come round to see the justice of that decision; like almost all those made by Lord Eldon, where doubts have been at first entertained of their propriety, further experience has removed those doubts, and established their perfect justice." It is always with the greatest diffidence, that the writer of the present Treatise, presumes to call in question the accuracy of a Judge of such eminence, and of such acknowledged accuracy as Sir A. Hart; but it is impossible not to observe here upon the loose manner in which he has referred to Lord Eldon's decision, which, although applicable to some descriptions of supplemental bills, cannot be adopted with respect to all of them. There can be no doubt, that where the original bill has been properly filed against all necessary parties, but in consequence of the transmission
[*176] of the interest of one of those parties to another, as by alienation or *bankruptcy, *pendente lite*, it becomes necessary to file a supplemental bill against the alienee or assignee, for the purpose of bringing him before the Court; it would be unnecessary, or perhaps improper, to re-state the original bill in the supplemental bill, because, as the new party comes in upon the same title of the original party, all that is necessary to be put in issue against such new party, is the fact of the transmission of interest having taken place; and, therefore, it may be sufficient to state merely the prayer of the original bill; or, if the cause has been heard, the decree; and even then a short statement of the original case, by way of inducement, for the purpose of shewing that the plaintiff has a title, will not, it is conceived, be objectionable. (*b*)

The course, however, must be different in cases in which the object of the supplemental bill is not to continue the suit against the person in whom the

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(*z*) Ibid. 495.
(*a*) 2 Moll. 31, 38.
(*b*) *Vide* Vigers v. Lord Audley, 9 Sim. 72.

interest of a party, originally before the Court, has become vested, but to bring before the Court an entirely new party, who either was interested at the time the original bill was filed, or has become so under a new title not derived from a former party, as in the case of a necessary party omitted, and subsequently brought before the Court by supplemental bill, or of a new party coming into *esse* after the original bill filed: there the supplemental bill is in fact, an original bill as against the new defendant, and must state enough of the case to put the title, of the plaintiff, to relief against such new defendant in issue; for as a defendant, who was not a party to the original bill, coming in upon a new title, cannot be called upon to answer the original bill, (*c*) there is no other method by which the plaintiff's title to maintain the suit, as against him, can be put in issue, than by a statement of it in the supplemental bill. It is, however, to be observed, that, for this purpose, the mere statement of the former proceedings has been held sufficient to put the facts of the case in issue with regard to this sort of defendant, (*d*) *i. e.*, "you may, in the supplemental bill, state that you made such a representation *in the former bill, instead of representing the facts in the second bill." (*e*) [*177]

In fact, the propriety of introducing a re-statement of the case from the original bill into the supplemental bill, must depend upon the question, whether the object of the supplemental bill is to state the mere fact of a bill having been filed, or to put in issue any of the circumstances and facts stated and charged in it. If the former is the object, the mere statement that the plaintiff had filed a bill which prayed such and such relief, will be sufficient; or if the draughtsman should not think this sufficient, he may introduce a short recital, taking care that, in reciting the bill or any former proceedings, he does it in the shortest manner possible, (the shorter the better,) since they can be of no use to his client; for the records of the Court are the same, whether truly or falsely recited, and from them alone the fact must be determined. (*f*) If the latter be the object in view, the facts intended to be stated may be set out in the supplemental bill, either in the way of original statement, or as a re-statement of the facts in the original bill, with an averment of their truth.

It may be observed that, in *Vigers* v. *Lord Audley*, Sir L. Shadwell, V. C., held, that even where a supplemental bill is filed against a new defendant, it is not necessary to state in it all the circumstances of the case at length; all that is requisite is, that the plaintiff should state so much of the case as shows that he has an equity against such defendant. In that case, the plaintiffs, who were members of a joint stock company, had filed a bill against the directors, and obtained an injunction against them. A new director was afterwards elected, and on his doing an act, in conjunction with one of the original directors, which was prohibited by the injunction, the plaintiffs filed a supplemental bill, on behalf of themselves and the other shareholders, stating merely that they had filed an original bill, which stated, amongst other things, the formation of a company, an act of Parliament enabling any director to sue or be sued on behalf of the company; and a contract, alleged to have been entered into by one of the directors with Lord *Audley, and that the shareholders of the company were very numerous, and, therefore, could not be made parties to the suit, so as to enable the plaintiffs to prosecute it with effect. The supplemental bill then set out the prayer of the original bill, that an injunction had been granted by the Lord Chancellor, restraining the directors from signing or issuing bills of exchange or other securities, and various other proceedings in the cause. It then stated the appointment of the new trustee, and the facts [*178]

(*c*) Baldwin v. Mackown, 3 Atk. 817.
(*d*) Lloyd v. Johnes, 9 Ves. 37.
(*e*) Lloyd v. Johnes, 9 Ves. 37.
(*f*) For. Rom. 210.

complained of as against him and the other director, and concluded with the usual supplemental prayer praying the same relief against the new defendant as was prayed by the original bill against the original defendant. To this bill, the new defendant put in a general demurrer, which was attempted, on the argument, to be supported principally on the ground that, as the same relief was prayed against the new defendant as the plaintiffs were entitled to against the other defendant, it was not sufficient to refer to the original bill as being on the files of the Court, but the case made by the bill ought to have been stated over again, otherwise it did not shew that the plaintiff had any equity to the relief prayed; but the Vice Chancellor over-ruled the demurrer, as the plaintiffs, having stated that the Judge of the Court had granted an injunction in the prior stages of the cause, had therefore stated sufficient to show that there was an equity.

If the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration of parties thereon, (*g*) and it must pray, that the defendants may appear and answer to the charges it contains; for, if the supplemental bill is not for a discovery merely, the cause must be heard, upon the supplemental bill, at the same time that it is heard upon the original bill, if it has not been before heard; and if the cause has been before heard, it must be further heard upon the supplemental matter. (*h*)

It is stated, in *Jones* v. *Jones*, (*i*) that where a supplemental bill, properly so
[*179] called, is brought for any new matter arisen *since the filing of the original bill, the defendants to the original bill ought to be made parties to the supplemental bill. An objection, however, to a supplemental bill, filed before hearing the original cause, for want of parties, should be taken by plea or demurrer before the cause comes on to be heard,—it will be too late to object to it at the hearing. (*k*) The rule is the same with regard to objections to a supplemental bill on the ground that matter alleged to be new or newly discovered was not so. (*l*)

If the supplemental bill has been rendered necessary by the alteration or acquisition of interest happening to a defendant, or a person comes into *esse* who is necessary to be made a defendant, the supplemental bill may be exhibited, by the plaintiff in the original suit, against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only; unless, which is frequently the case, the interests of the other defendants may be affected by that decree, in which case such other defendants must be made parties. (*m*) Where, also, a supplemental bill is merely for the purpose of bringing formal parties before the Court as defendants, the parties defendants to the original bill need not, in general, be made parties to the supplemental. (*n*)

Thus, where a cause, at the hearing, was ordered to stand over with liberty to the plaintiff to amend, by adding another party, and the plaintiff did not amend, but filed a supplemental bill against the party alone,—upon the two causes coming on for hearing together, it was objected that the plaintiff ought to have amended the original bill, or have made the original defendant a defendant to the supplemental bill, but the objection was over-ruled. (*o*) The case referred to was a strong case in favour of the necessity, if any existed, for making the original defendant a party to the supplemental bill, for the new party
[*180] was added in consequence of an objection taken by the *answer of the original defendant, that he was a necessary party, because he

(*g*) Lord Red. 59.
(*h*) Ibid.
(*i*) 3 Atk. 217.
(*k*) 3 Atk. 217.
(*l*) Lewellen v. Mackworth, 2 Atk. 40.
(*m*) Ld. Red. 59; *vide etiam* Bignall v. Atkins, Mad. & Geld. 369.
(*n*) Ld. Red. 59.
(*o*) Greenwood v. Atkinson, 5 Sim. 419.

was entitled to be reimbursed by him, what he, the original defendant, might be decreed to pay the plaintiff; but the Vice Chancellor held, that the objection to the supplemental bill was invalid, because it was filed for the purpose of being heard with the original bill, and of obtaining for the plaintiff the same relief as is prayed by the original bill. His Honor stated the distinction to be, *that where a supplemental bill is filed for the purpose of putting in issue a new fact, or an old fact newly discovered, it is right to make the original defendants parties to it, but where the case consists of facts which existed prior to the filing of the original bill, the defective party alone should be brought before the Court by the supplemental bill.*

This rule, however, will not apply where a person having acquired the interest of a party to a suit, thinks proper himself to file a supplemental bill; in such a case he must make all the other parties to the original bill, whether plaintiffs or defendants, parties to his supplemental bill. So also, where one of several co-plaintiffs assigns his interest to a stranger, and the remaining plaintiffs file a supplemental bill against the assignee, he must also make the other defendants to the original bill, parties to the supplemental bill. Thus, in *Feary* v. *Stephenson*, (*p*) where the original bill was filed by three plaintiffs against the executor of a person deceased, and, afterwards, one of the plaintiffs mortgaged his interest to a stranger, and subsequently took advantage of the Insolvent Act, whereupon the other two plaintiffs filed a supplemental bill against the mortgagee and the assignee under the Insolvent Act. Upon the two causes coming on for hearing together, some of the defendants to the original bill took an objection to the cause proceeding, because they had not been made parties to the supplemental bill, and Lord Langdale, M. R., allowed the objection; taking a distinction between a case where the assignment is of a defendant's interest, and one when it is of the interest of a plaintiff.

*It may be mentioned here, that a new party, representing the [*181] interest of a former party, who comes before the Court by a supplemental bill, whether filed by himself or by the plaintiff, stands exactly in the same plight and condition as the former party, is bound by his acts, and may be subject to all the costs of the proceedings from the beginning of the suit, (*q*) therefore it has been held that a purchaser of the interest of a party, *pendente lite*, on filing his supplemental bill, comes into Court *pro bono et malo*, and shall be liable to the costs of the proceedings from the beginning to the end of the suit. (*r*) So also, the assignees of a bankrupt who are brought before the Court by supplemental bill, may be liable to the costs of the whole suit, if they improperly resist the plaintiff's demand; (*s*) where, however, it appeared that the plaintiff had made no application to the assignees, on the subject of the suit, previously to filing the supplemental bill, Sir John Leach, V. C., refused to give costs against them. (*t*)

A supplemental bill generally calls upon the defendant to answer the supplemental matter only; if, however, it is occasioned by the transmission of the interest of a defendant who has not answered the original bill, and it is necessary to have a discovery, from the new defendant, of the matters in the original bill, it may pray that the defendant may answer the original bill. (*u*) And, in such case, the defendant will be bound to answer the original as well as the supplemental bill. The rule upon this subject is clearly laid down by the Vice Chancellor, in *Vigers* v. *Lord Audley*, (*v*) viz: where a bill of revivor and

(*p*) 1 Beavan. 42.
(*q*) Ld. Red. 53.
(*r*) Anon. 1 Atk. 89.
(*s*) Whitcomb v. Minchin, 5 Mad. 91.
(*t*) Ibid.
(*u*) *Vide* Vigers v. Ld. Audley, 9 Sim. 72.
(*v*) *Ubi supra.*

supplement is filed against a person who represents a defendant to the original bill, and the bill of revivor and supplement prays that the representative of the deceased defendant may answer both bills, he is bound to do so, although the *subpœna* taken out is a *subpœna* that requires him to answer the bill of revivor and supplement only; and the answer, in such a case, is headed as the answer of that defendant to the bill of revivor and supplement and also to the original bill. His Honor also added, that if the case is that of a mere bill [*182] *of revivor, that is one which does not require any answer to itself, but asks that the defendant may answer the original bill; an attachment will issue against the defendant if he do not answer the original bill. (*x*)

It is to be observed, that, although the rules above stated were laid down in a case in which the bill was a bill of revivor as well as of supplement, they will apply equally to supplemental bills occasioned by the death of a defendant, whose interest has become vested in another by a title which will not admit of a bill of revivor merely; or where a defendant becomes bankrupt or insolvent after appearance but before answer, and a supplemental bill is required to bring his assignees before the Court. So also, where a defendant dies before service of the *subpœna* or appearance, so that there is no original suit in Court, as against him, in consequence of which it is necessary to file a bill, which, as against the person who represents the interest of the plaintiff dying, is an original bill in the nature of a supplemental bill, the new bill may pray that the defendant may answer the original bill at the same time that he answers the supplemental matter. (*y*)

In other respects the prayer of a supplemental bill must be adapted to the object for which it is exhibited; but it always concludes with praying the process of the Court in the usual form.

A supplemental bill must be signed by counsel, and is filed in the same manner, and should be with the same Six Clerk as the original bill. (*z*)

A *subpœna* to appear and answer a supplemental bill is in the same form as a *subpœna* to answer an original bill, except that it specifies the nature of the bill which has been filed. The form of the *subpœna* is set out in the Appendix to the Orders of the 21st Dec. 1833, and obedience to the writ may be enforced in the same manner and by the same process as a *subpœna* to answer an original bill. (*a*)

It is to be observed, that where a supplemental bill, or a bill of revivor, is [*183] filed against a Peer, and he is required to answer *the original bill as well as the supplemental bill, or bill of revivor, he must be served with an office copy of the original bill at the same time that he is served with the letter missive to answer the supplemental bill, and that process issued for default of appearance, without serving him with such a copy, will be irregular. (*b*)

Many of the causes of demurrer which apply to an original bill, will apply to a supplemental bill, (*c*) but there are some grounds of demurrer which are applicable solely to supplemental bills. Thus if a supplemental bill is brought upon matter arising before the filing of the original bill, where the suit is in that stage of proceeding that the bill may be amended, the defendant may demur, (*d*) even though the bill contains an allegation that the facts were not known to the plaintiff till the original cause was at issue. (*e*)

(*x*) *Vide* Vigers v. Ld. Audley, 9 Sim. 72. (*y*) Asbee v. Skipley, Mad. & Geld. 296.
(*z*) 1 Turn. & Ven. 253. (*a*) *Vide ante*, Chap. VII, vol. 1, p. 554.
(*b*) Vigers v. Ld. Audley, 8 Law. Journ. N. S. Chancery, 15.
(*c*) Ld. Red. 164. (*d*) Ibid. 165.
(*e*) Colclough v. Evans, 4 Sim. 76; *sed vide* Crompton v. Wombwell, ibid. 628; and the Attorney General v. the Fishmongers' Company, 4 M. & C. 1—9; *et ante*, p. 152.

A defendant to a supplemental bill, may also demur if the same plaintiff files a supplemental bill claiming the same matter as in his original bill, but upon a title totally distinct, as in the case of *Tonkin* v. *Lethbridge*, (*f*) where a plaintiff filed a bill to redeem a mortgage as heir-at-law, and, upon an issue directed, was found not heir, and afterwards bought in the claim of a third person to the heirship, and filed a supplemental bill claiming under that purchase, the demurrer was allowed. (*g*)

If a bill is brought as a supplemental bill upon matter arising subsequent to the time of filing the original bill, against a person who claims no interest out of the matters in litigation by the former bill, the defendant to the bill thus brought as a supplemental bill may demur, especially if the bill prays that he may answer the matters charged in the former bill. (*h*)

It may be observed here, that a defendant cannot demur to a supplemental bill upon the ground that, by the present practice *of the Court, [*184] the plaintiff may obtain that relief by petition for which a supplemental bill was formerly necessary; as where, after a decree in a creditor's suit, upon the plaintiff being guilty of *laches*, another creditor was desirous of getting the conduct of the cause, and filed a supplemental bill for that purpose, it was held that a demurrer would not lie, because he had taken that course instead of applying to the Court by petition as he might, according to the practice, have done. (*i*)

With reference to this part of the subject, it may be mentioned that a motion will not lie to take a supplemental bill off the file for irregularity on the ground that it does not state supplemental matter. The proper course, in such case, is to demur. (*k*)

Besides those grounds of plea, which are common to supplemental and original bills, if a supplemental bill is brought on matter which arose before the original bill was filed and might have been introduced into the original bill, and this fact does not appear upon the supplemental bill, it may be pleaded. (*l*)

Pleas and demurrers to supplemental bills are subject to the same rules both with respect to their form and substance, and to the practice arising upon them as pleas and demurrers to original bills.

If a defendant to a supplemental bill neither demurs nor pleads to it, he must put in his answer as in the case of an original bill. If, however, there is any matter in the supplemental bill which is properly the subject of demurrer or plea, he may, by his answer, claim the same benefit of it as he would have been entitled to had he demurred or pleaded.

The reader is reminded in this place, that, according to the doctrine of Lord Eldon, in *Lloyd* v. *Johnes*, (*m*) where after an original bill, filed either by or against a tenant in tail who dies, a supplemental bill is filed either by or against a remainder man in tail, although the plaintiff in the one case, or the *defendant in the other, is generally bound by the statement or [*185] defence in the original cause; neither plaintiff nor defendant is shut out from stating particular circumstances attaching upon his case, and these circumstances may be brought before the Court either by the bill or by the answer or by a fresh examination of witnesses. (*n*) This rule, however, will not apply to

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(*f*) Cooper, 43.
(*g*) *Vide ante*, p. 170; *et vide* Pilkington v. Wignall, 2 Mad. 240.
(*h*) Ld. Red. 165; and *vide* Baldwin v. Mackown, 3 Atk. 817.
(*i*) Davies v. Williams, 1 Sim. 5; *vide ante*, vol. 2, p. 793.
(*k*) Bowyer v. Bright, 13 Pri. 316. (*l*) Ld. Red. 235.
(*m*) 9 Ves. 45.
(*n*) *Vide* Wingfield v. Whaley, 1 Bro. P. C. 200.

issue in tail, heir, or devisee, but is applicable only to a remainder man claiming by force of a new limitation. (*o*)

The form of an answer to a supplemental bill, and the manner of putting it in, filing it, &c., are the same as in the case of an answer to an original bill, and are subject to the same contingencies. (*p*)

Where a defendant to a supplemental bill is called upon to answer the original bill at the same time that he answers the supplemental matter, the usual course is to include the answer to the original bill and supplemental bill in the same answer; (*q*) it appears, however, that it is not absolutely irregular to separate them; and, in *Sayle* v. *Graham*, (*r*) where female plaintiffs had amended their original bill after answer, and married before the amendments were answered; whereupon a bill of revivor and supplement was filed by them and their husbands, praying that the defendants might answer the amended bill, and the defendants, before they answered the amendments, put in an answer to the bill of revivor and supplement only, the Vice Chancellor refused an application to take the answer off the file for irregularity, on the ground that it was still competent to the defendants to answer the amended bill.

A replication may be filed by the plaintiff to a supplemental bill, and a *subpœna* to rejoin served as in the case of an original bill. (*s*) It is to be observed, however, that a separate replication in a supplemental suit, is only necessary where there has been already a replication in the original suit. Where there has been no replication in the original suit, a general *replication will apply to the whole record, and not merely to the original bill. (*t*)

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If the new matter in the supplemental bill is not admitted by the defendant's answer, it must be proved, otherwise the supplemental bill will be dismissed with costs. (*u*) For this purpose, witnesses may be examined as to the new matter contained in the supplemental suit, and it is said that if interrogatories have been already exhibited in the original cause, the Court will, upon motion, give leave to add to the interrogatories in the original cause, so as the new interrogatories contain nothing but what relates to the supplement. (*y*)

This restriction, however, can only apply to cases in which interrogatories have already been exhibited, or the witnesses have only been partly examined in the original cause; where no witnesses have been examined, or no interrogatories have been exhibited in the original cause, interrogatories may, (provided publication has not passed,) be exhibited, and witnesses examined to prove the matters in issue in the original cause, as well as those in issue in the supplemental suit. (*z*) Where, however, publication has passed, it will be irregular to examine witnesses as to matters in issue in the original suit, and if any are examined as to such matters, the depositions cannot be read at the hearing. (*a*)

It is to be recollected, that a supplemental suit is merely a continuation of the original suit, and that whatever evidence was properly taken in the original suit, may be made use of in both suits, even though not intitled in the supplemental suit: thus depositions taken in the original suit, may be read at the hearing of both causes, and this was permitted in a case where the original bill was filed by the plaintiff, a married woman, in a wrong name, (*i. e.* as the widow of the testator, when her husband by a previous marriage was living,)

(*o*) Lloyd v. Johnes, *ubi supra*.
(*p*) *Vide ante*, Ch. XV, vol. 2, p. 239.
(*q*) *Vide* Vigers v. Ld. Audley, 9 Sim. 408.
(*r*) 5 Sim. 8.
(*s*) 1 Harr, (ed. Newl.) 69.
(*t*) Catton v. Earl of Carlisle, 5 Mad. 427.
(*u*) 1 Harr, (ed. Newl.) 69.
(*x*) Ibid.
(*y*) Ibid.
(*z*) *Vide* Lloyd v. Johnes, 9 Ves. 37; and *supra*, p. 166.
(*a*) Bagnall v. Bagnall, 12 Vin. Ab. 114. Pl. 9.

and the object of the supplemental bill was to correct this error, and to bring her husband before the Court. (*b*)

*It is also laid down that, in cases of alienation, *pendente lite*, the alienor is bound by the proceedings in the suit after alienation [*187] and before the alienee became a party to it; and depositions of witnesses, taken after the alienation and before the alienee became a party, may be used by the other parties against the alienor, as they might have been used against the party under whom he claims. (*c*)

If interrogatories are exhibited after supplemental bill filed, they should be intitled in both suits, unless the supplemental bill is merely filed against a new party for the purpose of bringing him before the Court, in which case, if the original defendants are not parties to the supplemental bill, they may, even after the supplemental bill has been filed, intitle their interrogatories in the original cause only. (*d*) The case will, however, be different, if they join in a commission to examine witnesses, or consent to an order for such commission, which is intitled in the two suits; in such case, the title of the interrogatories, and depositions must follow the title of commission, otherwise the depositions will be suppressed for irregularity. (*e*)

It will be recollected that in supplemental suits, instituted by or against a tenant in tail in remainder, after the death of a prior tenant in tail, plaintiff or defendant, certain distinctions exist with regard to reading evidence and admissions in the original suit, at the hearing of the supplemental suit, which have been pointed out by Lord Eldon, in *Lloyd* v. *Johnes*, (*f*) and have already been referred to, at some length, in the present Treatise. (*g*)

If there has been no decree in the original suit before the supplemental bill is filed, the original and supplemental suit may come on for hearing together, (unless the supplemental bill is merely for discovery,) and one decree will be made in both. (*h*) But if a decree has been obtained before the event by which the supplemental bill was rendered necessary, though *it be only a decree *nisi*, (*i*) there must be a decree on the supplemental bill, for [*188] the which purpose the supplemental cause must be set down for hearing alone; or it may be heard with the original cause for further directions, (*k*) in order to which, if necessary, the Court will, upon application, order the supplemental cause to be advanced. (*l*)

SECTION III.

Bills in the Nature of Supplemental Bills.

A supplemental bill, as we have already seen, is a mere continuation of the original suit, by or against a party having or acquiring the interest of a former party, and in fact forms, together with the original bill and proceedings under

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(*b*) Giles v. Giles, 1 Keen, 685.
(*c*) Ld. Red. 56; *vide* Garth v. Ward, 2 Atk. 174.
(*d*) *Vide* Pritchard v. Foulkes, 2 Beav. 133.
(*e*) Ibid. (*f*) 9 Ves. 37.
(*g*) *Ante*, p. 166.
(*h*) Ld. Red. 51—59; John v. Brown, Seton on Decrees, 385.
(*i*) Ld. Red. 51—59.
(*k*) Seton, 386; and *vide* Atty. Gen. v. Hurst, ib. 132.
(*l*) Ibid. and *vide* Hand, 108.

it, but one record. Cases, however, frequently occur in practice, in which the interest of an original party to the suit is completely determined, and another party becomes interested in the subject matter, by a title not derived from the original party, but in such a manner as to render it but just and reasonable that the benefit of the former proceedings should be had by or against such other party, without incurring the expense and risk of commencing an entirely new proceeding. The course of the Court, therefore, provides that, in such cases, the benefit of the former proceedings may be obtained, by means of a bill called "*An original bill in the nature of a supplemental bill.*"

The cases in which a bill of this description is required, may be collected from what has been already stated, (*a*) and it is sufficient, therefore, at present, to recall to the reader's recollection that if the plaintiff or defendant be an ecclesiastical person, and dies, the suit cannot be carried on by or against his successor in his benefice, by bill of revivor, nor can its defects *be supplied by supplemental bill. (*b*) So if a suit is instituted by or against a tenant for life, under a will or settlement, and he dies, a remainder man, claiming under the same settlement, who was not a party to the original bill, must be brought before the Court by original bill in the nature of a supplemental bill. (*c*) So also, must a bill of this nature be filed wherever the interest of a sole plaintiff is transferred to another, either by voluntary alienation or by the effect of bankruptcy or insolvency. (*d*)

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The distinction between a bill of this nature and a mere supplemental bill, has been pointed out before; (*e*) it is not necessary, therefore, to do more, on the present occasion, than remind the reader, that it is said, by Lord Redesdale, that although a bill of this description partakes of the nature of a supplemental bill, it is not an addition to the original bill *but another original bill, which, in its consequence, may draw to itself the advantage of the proceedings on the former bill;* (*f*) and that his Lordship, in another part of his work, (*g*) states that "there is this distinction between an original bill in the nature of a bill of revivor, and an original bill in the nature of a supplemental bill, viz: upon the first, the benefit of the former proceedings is absolutely obtained, so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same manner as if filed or taken in the second cause; and if any decree has been made in the first cause, the same decree shall be made in the second: but, in the other case, a new defence may be made; the pleadings and depositions cannot be used in the same manner as if filed or taken in the same cause, and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the Court to make a similar decree." (*h*)

With reference to the last passage, it is to be observed, on the authority of Lord Redesdale himself, as mentioned by Lord Eldon, in *Lloyd* v. *Johnes*, (*i*) that there is an obscurity in it, *and, as he seems to intimate, in the subject also, which it is not easy to remove; and it must be confessed that the observations of his Lordship, as they are reported, do not greatly assist in unravelling the difficulty. It may, however, be collected, from Lord Eldon's reasoning, that the observation of Lord Redesdale, though general, is not universal, and that in laying it down as a rule that, in the case of an

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(*a*) *Ante*, p. 164.
(*b*) Ld. Red. 56.
(*c*) *Ante*, p. 168.
(*d*) *Ante*, p. 164.
(*e*) *Ante*, p. 166.
(*f*) Ld. Red. 78.
(*g*) Ibid. 56.
(*h*) *Vide* the observations of Lord Eldon, upon this passage, in Lloyd v. Johnes, 9 Ves. 56 *et seq.*
(*i*) *Ubi supra.*

original bill in the nature of a supplemental bill, the depositions, pleadings, &c., cannot be used in the same manner as upon an original bill in the nature of a bill of revivor, his Lordship does not intend to assert that, in an original bill in the nature of a supplemental bill, the pleadings and depositions in the first cause cannot be used, but merely that they cannot be used *in the same manner*. (*k*) This is Lord Eldon's view of the matter, and his Lordship goes on to add, that "the difficulty arises from the negative proposition, without explaining the precise idea that belongs to it;" (*l*) with deference, however, the author begs to suggest, that the precise idea entertained by Lord Redesdale, may be very distinctly ascertained by reference to the definition of "an original bill in the nature of a supplemental bill," as already pointed out, from which it may be collected, that it is, in fact, not a supplemental bill, (in which case, from its being a mere continuation of the former suit, the pleadings and depositions in such former suit, would have been as much evidence as they would have been in the original suit,) but another original bill, in which the pleadings and evidence in the original suit can only be made use of, in the same manner and under the same limitations and restrictions as the proceedings in one suit are, in ordinary cases, capable of being admitted as evidence in another. The confusion upon this point has, in fact, as it appears to the author, arisen from considering a bill of this nature more in the light of a supplemental bill than of an original bill, in which latter light, Lord Redesdale evidently views it; for if we assume that it is, in its nature, an original bill, it is obvious that, when he lays it down, that in an original bill in the nature of a supplemental bill, the pleadings and depositions in the former cause cannot *be used in the same manner as if filed or taken in the same cause, his meaning [*191] is, that if you wish to use the pleadings and depositions in the first cause, as evidence in the second, you must obtain an order to do so; as in the ordinary case of reading the pleadings and depositions belonging to one suit, in another, (*m*) and that, when they are tendered as evidence, their admissibility will depend upon the same rules with regard to privity, &c., as have been already pointed out with regard to the admissibility of the pleadings and evidence in one cause, in another where the suits are distinct. (*n*)

So also with regard to the decree, Lord Redesdale says that if any has been obtained, it is no otherwise of advantage than as it may be an inducement to the Court to make a similar decree, (*o*) this is precisely the effect which a decree in one original cause would have, in *pari materia* in another cause; whereas the effect of a decree in a suit purely supplemental, would be to bind those parties who are affected by it, by means of their privity of interest.

An original bill in the nature of a supplemental bill, must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then shew the ground upon which the Court ought to grant the benefit of the former suit, to or against the person so become entitled, and pray the decree of the Court adapted to the case of the plaintiff in the new bill. (*p*)

(*k*) Lloyd v. Johnes, 9 Ves. 55.
(*l*) Ibid.
(*m*) *Vide ante*, vol. 2, p. 427; *vide etiam*, Backhouse v. Middleton, cited ib. p. 433.
(*n*) Ibid. p. 429.
(*o*) Ld. Red. 57.
(*p*) Ibid. 78. The form of a bill of this description has recently undergone considerable discussion before Sir L. Shadwell, in Woods v. Woods, 8 Law J. N. S. Chancery, 308, in which his Honor decided, that where such a bill is exhibited against new defendants, in consequence of the death of a former defendant, it will not be impertinent on the mere ground that it re-states the allegations of the original bill. His Honor was also of opinion, that it was competent to the plaintiff, in such a bill, to state allegations in the answer of the

[*192] *The proceedings upon a bill of this description are the same as those upon original bills in general.

There is another description of bill known in practice, which, although classed by Lord Redesdale amongst bills in the nature of original bills, is still so far supplemental in its nature as to render a short notice of it, in this place, not improper. The bill alluded to is what is termed by Lord Redesdale, "*a bill to carry a decree into execution.*"

A bill of this description is proper where, after a decree has been pronounced, it has happened that, owing to some neglect of the parties to proceed upon the decree, their rights have become so embarrassed by subsequent events, that no ordinary process of the Court upon the first decree will serve, and it is therefore necessary to have another decree of the Court to ascertain and enforce them. Thus where a decree was pronounced against a defendant, to have a settlement delivered up, and a perpetual injunction, and afterwards the plaintiff died, having made a will, and thereby bequeathed all her estate to trustees, to be sold for the payment of her debts and legacies, the creditors and legatees were obliged to file a bill against the devisee of the former defendant, who was dead, to have the benefit of the decree obtained by the plaintiff, in order that the estate might be sold, and their debts and legacies paid. (*q*)

Sometimes such a bill is exhibited by a person who was not a party, nor claims under any party, to the original decree, but claims in a similar interest or is unable to obtain the determination of his own right till the decree has been carried into execution. (*r*) A bill of the former description was attempted in *Binks* v. *Binks*, (*s*) which has been before referred to, and another has been since more successfully prosecuted, in *Oldham* v. *Eboral*, (*t*) before Lord Brougham. In that case a suit had been instituted by Mr. Freeman and other legatees of a *Mrs. Haigh, (who had been formerly married to a Mr. Oldham,) against her executor for an account, amongst other things, of the rents and profits of certain houses and lands at Calcutta, which were supposed to have been part of her personal estate; but, upon doubts having been suggested as to the tenure of the houses and land, and whether, in fact, they were not the real estate of Mr. Oldham, the first husband of the testatrix, a supplemental bill was filed for the purpose of raising that question against the Attorney General and the East India Company, on an allegation that the plaintiffs had been unable to ascertain who was Mr. Oldham's heir-at-law. Upon the hearing it was, amongst other things, referred to the Master to ascertain the tenure of the property, and if he should be of opinion that it was freehold, to inquire and state to the Court, who was the heir-at-law of Samuel Oldham. Under this reference, the Master reported that the houses and land were freehold, and he also reported that he was unable to ascertain who was the heir-at-law, &c., but upon a subsequent reference, a person of the name of Eboral established his claim as heir-at-law *ex parte materna*, and was reported to be so by the Master, who also reported that there were no heirs *ex parte paterna*. Whereupon a supplemental bill was filed, by the original plaintiffs, against

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defendant who has died, and to charge new matter for the purpose of meeting the defence in that answer, though such new matter might relate to circumstances anterior to the filing of the original bill, and might have been introduced by amendment of the original bill, as against that defendant if he had lived.

(*q*) Johnson v. Northey, Prec. in Ch. 134, 2 Vern. 407, S. C.; *vide etiam* 2 Chan. Rep. 228.

(*r*) Lord Red. 75. (*s*) 2 Bligh, 593.

(*t*) 1 Cooper's Sel. Cases, Temp. Brougham, 27.

Eboral, as the heir-at-law of Oldham, upon which there was a decree giving them the benefit of all the former proceedings, against Eboral, as if Eboral had been originally a party to the suit, and dismissing the bill against the Attorney General and the East India Company. The result of the cause was, that the property in India was declared to be freehold, and the possession thereof decreed to Eboral. Subsequently, however, it was discovered that a Mrs. Oldham and other persons of the name of Smith were the heirs-at-law, *ex parte paterna*, of Samuel Oldham, and these persons having established their claim, filed the present bill against Eboral and the other parties on the record to the former suit, praying to have the benefit of the proceedings in the former suit, and that the same might be reversed so far as the title of Eboral was thereby set up in opposition to them in their character of heirs-at-law, and upon this cause *coming on to be heard before Lord Brougham, he eventually made [*194] the decree sought for by the bill.

There is no doubt that the decree, in the above case, was perfectly correct; but it is to be remarked, as somewhat singular, that the bill upon which it was founded appears, from the printed reports, to have been treated, as well in the argument as in the judgment, as an original bill in the nature of a supplemental bill, and not, as it in fact was, a bill to carry the former decree into execution by a person *who was not a party, nor claimed under any party to the original decree, but claimed in a similar interest.*

A bill of this description may also be brought by or against a person claiming as assignee of a party to the decree. This appears to have been the nature of the bills in *Organ* v. *Gardiner*, (*u*) and in *Lord Carteret* v. *Paschal*; (*x*) and the case of *Binks* v. *Binks*, (*y*) which has been already referred to, (*z*) may perhaps be considered as coming more within the description of this class of bills than that of a supplemental bill.

Such a bill may, also, be brought to carry into execution the judgment of an inferior Court of Equity, if the jurisdiction of that Court is not equal to the purpose, as in the case of a decree by the Court of Great Session in Wales, (before the abolition of those Courts,) which the defendant had avoided by flying into England. (*a*)

It is to be observed that, in the case last referred to, the Court thought itself entitled to examine into the justice of the decision, though it had been affirmed in the House of Lords; and it is laid down, that, although where a decree is capable of being executed by the ordinary process and forms of the Court, whatever the iniquity of the decree may be, yet, till it is reversed, the Court is bound to assist it with the utmost process the course of the Court will bear; but, where the common process of the Court will not serve, and things come to be in such a state and condition after a decree made, that it requires an original bill, and a second decree upon that, before the first *decree can [*195] be executed, if the first decree is unjust, then this Court desires to be excused in making it its own act, and to build upon such foundations, and charging its own conscience with promoting an apparent injustice; and this obliges the Court to examine the grounds of the first decree, before it makes the same decree again. (*b*)

The principle above laid down was acted upon in *Johnson* v. *Northey*, (*c*) where a bill was filed by the creditors of a deceased party to have the benefit

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(*u*) 1 Ch. Ca. 231.
(*x*) 3 P. Wms. 197; and *vide* Paschall v. Thurston, 2 Bro. P. C. ed. Toml. 10, S. C.
(*y*) 2 Bligh, P. C. 593. (*z*) *Ante*, p. 161.
(*a*) Ld. Red. 76; Morgan v. —— 1 Atk. 408.
(*b*) *Vide* Lawrence v. Berney, 2 Cha. Rep. 127.
(*c*) Prec. in Ch. 134; 2 Vern. 407, S. C.; *vide etiam* Atty. Gen. v. Day, 1 Ves. 218.

of a decree, by which the defendant, who claimed under a settlement of certain real estates, made by the plaintiff's ancestor, was ordered to deliver up the settlement as having been revoked; and the Lord Keeper, (Wright,) held that the creditors having brought their bill to execute the decree, had opened it, and directed an issue to try whether the deed was revoked or not. So also, in the case of *Werden* v. *Gerard*, (*d*) the interest of an infant party being affected by the decree, the Court refused to carry it into execution upon a bill for that purpose, and made a decree according to the rights of the parties. And in *West* v. *Skip*, (*e*) Lord Hardwicke, although he considered the general rule to be, that, on a bill of this nature, the Court can only carry the former decree into execution, yet, as there were several instances in which the Court had considered the directions, and whether there was any mistake, as had been done by Lord Cowper to attain the justice of the case, he held it might be done in the case before him, and decreed accordingly.

The question whether, upon a bill to carry a decree into execution, the propriety of the original decree might be examined, or impeached, or the decree varied, was much discussed before the House of Lords, in *Hamilton* v. *Houghton*, (*f*) in which a decree, which was erroneous, was reversed, upon a bill of this description, notwithstanding there had been a very long acquiescence.

It is to be observed, however, that although the original decree may be controverted upon a bill to carry it into execution, *it is only the defendant, in the new suit, who can call it into question, the plaintiff never can; (*g*) he must, if dissatisfied with the decree, impeach either by bill of review or some proceeding of that nature. (*h*)

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A bill, of the description above alluded to, is, generally, partly an original bill and partly a bill in the nature of an original bill, though not strictly original; and sometimes it is, likewise, a bill of revivor, or a supplemental bill, or both; (*i*) and the frame of the bill and the course of proceedings upon it varies accordingly. (*i*)

It is right here to notice another class of bills mentioned by Lord Redesdale, which are in their nature supplemental, though classed by his Lordship amongst bills in the nature of original bills. The bills alluded to are termed "*Bills to suspend or avoid the operation of decrees.*" (*k*) They appear, however, to be adapted only to contingencies arising from public events, and as the instances of these which are to be found in the books, (*l*) originated chiefly by the embarrassments occasioned by the great rebellion in the reign of Charles I. and the state of affairs after his death, they are to be considered with much caution.

(*d*) Cited Ld. Red. 76, n.
(*e*) 1 Ves. 239.
(*f*) 2 Bligh, P. C. 169.
(*g*) Robinson v. Robinson, 2 Ves. 225, 232.
(*h*) *Vide* Shepherd v. Titley, 2 Atk. 348.
(*i*) Ld. Red. 76.
(*k*) Ld. Red. 74.
(*l*) Cocker v. Bevis, 1 Ch. Ca. 61; Venables v. Foyle, ib. 3; Whorewood v. Whorewood, ib. 250; Wakelin v. Walthal, 2 Ch. Ca. 8.

SECTION IV.

Bills of Revivor.

WHERE a suit is perfect in its original formation, but afterwards becomes discontinued or imperfect by abatement, the general method of continuing it, or of remedying the defect, is by *Bill of Revivor.*

*Where an abatement takes place before decree signed and inrolled, a bill of revivor is the only proceeding, which the practice [*197] of the Court furnishes, by which the suit may be continued, but, if an abatement occurs after a decree signed and inrolled, the party wishing to continue it may proceed either by bill of revivor or by a *subpœna* in the nature of a *scire facias*, which is an ancient process, upon the return of which, the party to whom it is directed may shew cause against reviving the decree, (*a*) by insisting that he is not bound by it, (*b*) or that, for some other reason, it ought not to be enforced against him, or that the person, suing out the *subpœna*, is not entitled to the benefit of the decree. If, upon cause being shewn, the opinion of the Court is in his favour, he will be dismissed with costs; (*c*) if it is against, or if he does not oppose the reviving of the decree, interrogatories may be exhibited for his examination touching any matter necessary to the proceedings. If he opposes the reviving of the decree on the ground of facts which are disputed, he must also be examined upon interrogatories, to which he may answer or plead, and, upon issue being joined and witnesses examined, the matter may be fully heard and determined by the Court. It is to be observed, however, that, if there has been any proceeding subsequent to the decree, this process will be ineffectual, as it revives the decree only, (*d*) and the subsequent proceedings cannot be revived but by bill; and, for this reason and from the inrolment of decrees being now much disused, the course of proceeding by *subpœna scire facias* has fallen into disuse, and it is become the practice to revive in all cases, indiscriminately, by bill. (*e*)

It may be observed in this place, that, in general, the Court will not permit a suit to be revived for the purpose of deciding the question of costs only. (*f*) The general rule being, that if a party die, *before taxation* of costs, there can be no revivor *in respect of costs only against his personal repre- [*198] sentatives. (*g*)

The rule does not, of course, apply where any thing else is directed by the decree which remains unexecuted. "If, by the decree," says Lord Chief Baron Gilbert, "the party is to pay a sum of money, or if a duty is decreed, if he is to deliver over a bond, or deed, or writings, or if any thing is annexed to the decree besides costs, the suit may be revived." (*h*)

It is to be remarked, also, that the rule applies only to costs which remain untaxed at the time when the abatement takes place. Where the costs have been actually taxed, and the Master's certificate signed, there may be a revivor for them, (*i*) because, when taxed, they become a judgment debt, and as at law

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(*a*) Ward v. Lake, 3 Cha. Rep. 15.
(*b*) Brown v. Bermuden, 1 Cha. Ca. 272.
(*c*) Ibid.
(*d*) 2 Ch. Rep. 67.
(*e*) Ld. Red. 54.
(*f*) Ld. Red. 164; For. Rom. 181.
(*g*) *Vide* Beames on Costs, ed. 1840, p. 131, and the cases cited in the note.
(*h*) For. Rom. 181; Johnson v. Peck, 2 Ves. 465.
(*i*) Lowten v. Corporation of Colchester, 2 Mer. 114; and *vide* Beames on Costs, ed. 1840, p. 132; and the cases there cited, *notis*.

you may revive a judgment so you may here. (*k*) But, in order to entitle a party to revive, the taxation must have been complete by the Master's having signed his certificate, otherwise the costs will be considered as untaxed. It is true that, in *Morgan* v. *Scudamore*, Lord Rosslyn appeared to doubt whether he should not direct the report to be entered *nunc pro tunc*, (*l*) but, upon the case coming before him a second time, he seems to have abandoned that ground and to have taken a broader one. (*m*)

It is right also to mention, that, in *Tucker* v. *Wilkins*, (*n*) where the plaintiff's solicitor, at the request of the defendant's solicitor, had agreed to postpone the taxation of costs decreed to be paid to the plaintiff, on an undertaking that the plaintiff should not be prejudiced thereby, and the plaintiff died after the costs were taxed, but before the Master's certificate had been signed, whereupon his representatives filed a bill of revivor stating the facts before mentioned, and praying, under the usual order to revive, that the defendants might pay the [*199] amount of the *plaintiff's costs, and that the Master might be at liberty to make his certificate *nunc pro tunc*, and date it before the death of the plaintiff,—upon a plea being put in to this bill on the part of the defendant, the Vice Chancellor held that the agreement stated in the bill amounted, in fact, to an agreement that the suit should be revived. But it is to be remarked that the circumstances of that case were very special, and cannot in any way be considered as impugning the general rule which has been laid down.

A distinction has been attempted to be made between an abatement by the death of the party to pay the costs, and an abatement by the death of the party to receive them, holding in the latter case, that there may be a revivor for costs. (*o*) Thus, in *Morgan* v. *Scudamore*, (*p*) before referred to, where the plaintiff died after the Master had settled the amount of costs, but before he had made his report, Lord Rosslyn, although, as has been stated, he at first doubted whether he should not order the report to be entered *nunc pro tunc*, upon the case coming before him a second time, seems to have taken a broader ground, and to have thought taxation not absolutely necessary to entitle the plaintiff to revive; but, in *Jupp* v. *Gearey*, (*q*) Sir John Leach, V. C., held, on demurrer, that if the plaintiff dies before the costs of a bill dismissed are taxed, a bill of revivor by the defendant against his representatives for costs cannot be sustained.

The only exceptions to the general rule above laid down, that *there can be no revivor for costs only, which have not been taxed before the abatement happened*, are, where they are directed to be paid out of a particular estate or fund, (*r*) or are decreed against an executor out of assets, (*s*) in which cases they are considered as a charge or lien upon the estate, and not upon the person, and, therefore, do not come within the principle of Courts of Law, (on analogy to which the rule is founded,) that "*actio personalis moritur cum persona.*"

[*200] *With respect to the species of abatement which may be remedied by bill of revivor, it is laid down, that whenever a suit abates

(*k*) Ibid.; Edgill v. Brown, 1 Dick. 62; Blower v. Morrets, 3 Atk. 772; Loader v. Price, 2 Fowler's Ex. Pr. 309.
(*l*) 2 Ves. J. 313.
(*m*) 3 Ves. 195. *Vide* next page.
(*n*) 7 Sim. 349.
(*o*) Beames on Costs, ed. 1840, p. 133.
(*p*) 2 Ves. J. 313; 3 Ves. 195; *vide ante*, p. 198.
(*q*) 5 Mad. 375.
(*r*) Blower v. Morrets, 3 Atk. 772; Kemp v. Mackrell, 3 Atk. 812; 2 Ves. 580. S. C.; Johnson v. Leake, cited 3 Atk. 773.
(*s*) Beames on Costs, ed. 1840, p. 132.

by death, and the interest of the person whose death has caused the abatement, is transmitted to that representative which the law gives or ascertains as, an heir-at-law, executor, or administrator, so that the title cannot be disputed, at least in the Court of Chancery, but the person in whom the title is vested alone to be ascertained, the suit may be continued by bill of revivor merely: so also, if a suit abates by the marriage of a female plaintiff, and no act is done to affect the rights of the party but the marriage, no title can be disputed; the person of the husband is the sole fact to be ascertained, and therefore the suit may be continued in this case likewise, by bill of revivor merely. (*t*)

It is generally necessary, in order to entitle a party to revive, that there should be a privity between him and the individual whose death has caused the abatement: it is upon this ground held, that where the interest of a plaintiff suing in *autre droit*, determines, the suit must be continued by supplemental bill, and not by bill of revivor. (*u*) It seems, however, that the rule will not hold where a man files a bill as administrator and dies; in such cases, the administrator *de bonis non* may sustain a bill of revivor, although there is no actual privity between him and the original plaintiff. (*x*)

If, however, upon the abatement happening, the interest of the party does not vest in any representative which the law gives or ascertains, as in the case of bankruptcy or insolvency, *or of a devisee of real estate, the [*201] suit cannot be continued by bill of revivor, but must, where the abatement is caused by the bankruptcy or insolvency of a defendant, be continued by supplemental bill, which, in this case, is called *a supplemental bill in the nature of a bill of revivor*. (*z*) So where the suit is abated by the bankruptcy or insolvency of a sole plaintiff, his assignees cannot, as we have seen, continue the suit by bill of revivor, but must do so by *original bill, in the nature of a supplemental bill*. (*a*) So also, in a suit relating to land, where a plaintiff dies, having devised the land which is the subject of the litigation, the suit must be continued by the devisee by another species of bill, *called an original bill in the nature of a bill of revivor*, and not by bill of revivor. (*b*)

The same rule applies to abatements occasioned by the death of parties defendant as well as of parties plaintiff; (*c*) therefore, a bill of revivor will not lie against the devisee of a defendant, but the suit must be continued against him in the same manner that it is continued by the devisee of a plaintiff. (*d*)

It is to be recollected, that, till a defendant has appeared, there is no cause in Court against such defendant, (*e*) therefore, if a defendant dies before appearance, the suit cannot be continued against his personal representative, by bill

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(*t*) As to the abatement and continuation of suits by married women, *vide ante*, vol. 1, 153. The reader is reminded here, that where a female defendant marries, no abatement takes place, but the husband ought to be named in all future proceedings; *ante*, vol. 1 p. 217 *et seq.*

(*u*) *Ante*, p. 161.

(*x*) Ld. R. 51 n. refers to Huggins v. York Buildings Comp, 2 Eq. Ca. Ab. 3, and Owen v. Curzon, 2 Vern, 237; *sed vide* the note in Mr. Raithby's edition.—It is to be remarked, that the last mentioned case, supposing it to be correct, does not bear out the proposition in the text, in its full extent, inasmuch as the ground given for the decision, (viz: that it comes within the meaning of the Statute 30 C. II, c. 6,) limits it to a case in which there has been a decree in the original suit; it is apprehended, however, that the *dictum* of Lord Redesdale is fully supported by the other case referred to. *Sed vide* Cooper's Eq. Pl. 76, and Story's Eq. Pl. 252.

(*z*) *Ante*, p. 172. (*a*) *Ante*, p. 171.

(*b*) Ld. Red. 55, Backhouse v. Middleton, 1 Cha. Ca. 175; 3 Cha. Rep. 39 b.; *vide post*, p. 226.

(*c*) Page v. Page, Mos. 44 cites 1 Cha. Ca. 174, 231, 123; 2 Vern. 548, 672; 1 Vern. 426, 283.

(*d*) Ld. R. 56. (*e*) *Ante*, p. 172.

of revivor, but a bill ought to be filed against such personal representative which will be an original bill as far as respects him, but a supplemental bill with respect to the suit. (*f*)

It may be noticed here, that it is not every death of a party to a suit which occasions such an abatement as will suspend the proceedings, and that if the interest of the party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest, which happens [*202] in the *case of a tenant for life, or a person having a temporary or contingent interest, or an interest defeasible on a contingency, the suit does not so abate as to require any proceeding to warrant the prosecution of the suit against the remaining parties; but although, if the party dying be the only plaintiff or only defendant, there may be necessarily an end of the suit, no subject of litigation remaining. (*g*)

Also, if the whole interest of the party dying survives to another party, so that no claim can be made by or against the representatives of the party dying, as if a bill be filed by or against joint tenants, and one dies, the suit may be continued by or against the survivor, without revivor; (*h*) and where the suit is by or against trustees or executors, and one dies, not having possessed any of the property in question, or done any act relating to it which may be questioned in the suit, or by or against husband and wife, in right of the wife, and the husband dies under circumstances which admit of no demand by or against his representatives, the proceedings do not abate, although, as we have already seen, the wife is not bound to continue the suit, unless she thinks proper to do so. (*i*)

So if a surviving party can sustain the suit, as in the case of several creditors, plaintiffs, on behalf of themselves and other creditors, no bill of revivor is necessary, because the representatives of the deceased plaintiff may come in under the decree. (*k*) It is to be observed, however, that although, in such case, no revivor is necessary, yet if one of the original plaintiffs, in such a suit, dies after the decree, his personal representative may, if he thinks proper, revive the suit; thus, in *Burney* v. *Morgan*, (*l*) where the original bill was filed by Burney on behalf of himself and of all the other creditors, under a trust deed, against a purchaser, in which *Morgan*, who was an incumbrancer upon the trust estate, joined, and, upon the hearing, a decree was made, establishing the agreement for sale of the estate, and directing the Master to take the accounts [*203] usual in a creditor's suit, it happened that Burney died, *whereupon his personal representative filed a bill of revivor against Morgan and the other defendants, Morgan afterwards died, and upon his death his personal representatives filed a bill of revivor, (making the representative of Burney a defendant as well as the other defendants,) and then moved the Court that the personal representative of Burney might be restrained from proceeding in her bill of revivor, and that he alone might prosecute the decree. Upon hearing the motion, the Vice Chancellor, Sir J. Leach, held, that although it was true that the death of Burney, who was co-plaintiff as a judgment creditor, did not abate the suit, because the other plaintiff, Morgan, could effectually prosecute the decree, and had full interest to do so until his debt was satisfied; yet he had no interest in the further prosecution of the suit for the benefit of

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(*f*) Crowfoot v. Mander, 9 Sim. 396, and *vide* Asbee v. Shipley, Mad. and Geld. 296; Stewart v. Nicholls, Taml. 307, and *ante*, p. 172.

(*g*) Ld. Red. 46.

(*h*) Fallowes v. Williamson, 11 Ves. 309; Boddy v. Kent, 1 Mer. 364; but the case is different in the case of tenants in common, ibid.

(*i*) Lord Red. 47, *et vide ante*, vol. 1, p. 153.

(*k*) Boddy v. Kent, *ubi supra*. (*l*) 1 S. & S. 358.

the judgment creditors, and that the personal representative of Burney had, therefore, a right to claim by revivor, the same power of prosecuting the suit for the benefit of the judgment creditors as Burney himself possessed.

Where an abatement of a suit takes place before decree, the only persons intitled to revive, where the abatement has occurred by the death of a sole plaintiff, is the representative, real or personal, as the case may be, of such plaintiff, unless, indeed, the bill was originally filed by the plaintiff in a representative capacity, viz: as executor or administrator of a person deceased, in which case the party to revive will be the individual in whom the representation of the deceased person is vested, and not the representative of the original plaintiff, unless such representative is also clothed with the character of representative of the original testator or intestate: thus if a bill is filed by the administrator of a creditor who dies, the bill of revivor must be filed not by his personal representative, but by the administrator *de bonis non* of the creditor. (*h*)

If the abatement has occurred in consequence of the death of one of several plaintiffs, the suit may be revived by the representative of the deceased plaintiff, either in conjunction *with or separately from the surviving [*204] plaintiffs, who must, however, be parties. (*hh*)

It seems also, that where one of several plaintiffs dies, whereby the suit becomes abated, one of the surviving plaintiffs may, if the other surviving plaintiffs refuse to join, file a bill of revivor alone, making the other surviving plaintiffs who refused to join, as well as the representatives of the deceased plaintiff, defendants to the revivor. (*i*) And where, upon the death of a defendant, one of three plaintiffs, who had become his representative, filed a bill of revivor against the other two plaintiffs, who appeared, and afterwards filed another bill of revivor, the second bill of revivor was ordered to be taken off the file, and the order to revive made upon it was discharged but without costs. (*k*)

It may be noticed here, that, in the case of a bill by a corporation sole, the death of the plaintiff occasions an abatement, but that a material distinction arises with respect to the person entitled to revive or continue the suit. If the plaintiff was entitled to the subject matter for his own benefit, the suit may be revived by his personal representative; (*l*) but if the plaintiff was only entitled in his corporate capacity, for the benefit of himself and successors, his successor is the person who ought to continue the suit, which he must do by means of an original bill in the nature of a supplemental bill. (*m*)

When the abatement is occasioned by the marriage of a female plaintiff, the suit may be revived by the husband and wife jointly; or if the property in litigation be the wife's separate property, the bill of revivor must be filed on the part of the wife by her next friend. The bill, however, in such case, can hardly be a bill of revivor alone, but must be accompanied *by a [*205] supplementary statement to shew the settlement under which the wife became intitled to a separate estate.

(*h*) Huggins v. York Buildings Comp. 2 Eq. Ca. Ab. 3; *vide ante*, p. 200, n. (*x*) If in a case of this nature, a suit has been revived by a wrong party, the proper course to be pursued by the right party, is to revive *de novo;* ibid.; and *vide* Ryland v. Latouche, 2 Bligh, 566.

(*hh*) Fallowes v. Williamson, 11 Ves. 309.

(*i*) Finch v. Ld. Winchelsea, 1 Eq. Ca. Ab. 2.

(*k*) Livesey v. Livesey, 1 R. & M. 10. (*l*) *Vide ante*, vol. 1, p. 28.

(*m*) Ibid. It is there stated that, in such case, the successor is the person who ought to revive; this, however, is inaccurately expressed, since it is one of those cases in which the suit cannot be continued by bill of revivor, or even by a mere supplemental bill, but the benefit of it must be obtained by original bill, in the nature of a supplemental bill, as stated in the text.

Where the abatement has occurred by the death of a defendant before decree, the suit can only be revived by the plaintiff or those claiming under him; and it is to be observed that in no case, before decree, can a defendant or those claiming under him revive a suit.

It may be mentioned in this place, that much difference of opinion has existed amongst the Judges of the Court, as to the right of a defendant, where an abatement takes place before decree, to compel the plaintiff to file a bill of revivor within a given time, or submit to have his bill dismissed. The subject has been partially discussed in a former part of this Treatise, (*n*) when the inclination of the author's opinion, founded upon the authority of Sir John Leach, in *Caddick* v. *Masson* (*o*) and *Adamson* v. *Hull*, (*p*) and on Sir L. Shadwell's decision, in *Canham* v. *Vincent*, (*q*) was expressed to be in opposition to the right. Since those observations, however, were published, the subject has undergone a further discussion, before Lord Langdale, M. R., in *Chawick* v. *Dismes*. (*r*) In that case, the sole plaintiff being dead, the defendant moved that his administrator might revive the cause within a given time, or that the bill might be dismissed *without costs*, and his Lordship made the order. In delivering his judgment, his Lordship said, he had made inquiries on the subject, and that, omitting those cases which have arisen in bankruptcy, (*s*) which, though strongly analogous, might not be thought strictly applicable, he found that, in *Jones* v. *Massey*, (*t*) the two plaintiffs were dead, and on affidavit of notice of motion, by the defendants, the Bank of England, on the executor of the plaintiff who died last, it was ordered that the bill might be revived in a fortnight, or that an injunction that had been granted might be dissolved, and the bill dismissed with costs; that, in *Turner* v. *Cole*, (*u*) an *injunction to stay proceedings at law had been obtained, and continued on the merits confessed in the answer; and, on the plaintiffs bringing deeds into Court and paying a sum of money into the Bank, the sole plaintiff being dead, the defendant moved, against the executrix, that she should revive the cause in a fortnight, or that the injunction should be dissolved, and it was so ordered. The defendant then revived his judgment at law, and levied execution, after which a balance remained due to him; and thereupon he moved, *in the abated cause*, that the executrix of the deceased plaintiff might either revive the suit in a limited time, or that the Accountant General might transfer, to the defendant, the fund which arose from the money paid into Court, by the deceased plaintiff; and also that the title deeds deposited by the deceased plaintiff might be delivered to the defendant's Clerk in Court for his use, and it was so ordered. His Lordship also referred to *Brown* v. *Warner*, (*x*) in which the plaintiff had obtained an injunction to restrain the defendant from proceeding in an action to recover possession of a messuage, and the injunction was continued on the merits. The sole plaintiff then died, and his widow took possession of the messuage; it was not then known whether the deceased had made a will, and no letters of administration had been granted, and, under those circumstances, it was ordered, that the representative of the late plaintiff should exhibit a bill of revivor in a fortnight, or, in default thereof, the bill should be dismissed with costs; and it was ordered, that service of the order on the late plaintiff's Clerk in Court and on his solicitors and on the widow, should be deemed good service. "These orders," his Lordship observed, "were made by Lord Eldon,

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(*n*) *Ante*, vol. 2, p. 363.
(*o*) 1 Sim. 501.
(*p*) 1 S. & S. 249, *sed vide contra*, Turn. & R. 258, S. C.
(*q*) 8 Sim. 277.
(*r*) Rolls, 8 Dec. 1840, *ex relatione*, C. Beavan.
(*s*) *Vide ante*, vol. 2, p. 362.
(*t*) Before Lord Eldon, 17th Dec. 1805.
(*u*) 28th of March, 1808.
(*x*) 4th of February, 1809.

and although it does not appear that, in any of them, the representative of the deceased party appeared and resisted the motion, yet I cannot suppose that orders so special passed without consideration, or that they are such as would not have been made if the representatives had appeared and stated no sufficient reasons against them; and although there might, as I conceive, have been some modification of the orders as to costs, if the representatives *had appeared, there seems no reason to dispute the regularity of the orders in any other respect; and, I apprehend, that if these orders had been brought to the attention of the Vice Chancellor, he would have decided the case, *Canham* v. *Vincent*, differently. The inconvenience would, undoubtedly, be very great to the defendant, if it were left to the option of the administrator of a deceased sole plaintiff to keep the defendant in a state of uncertainty as to the prosecution of the suit, for an indefinite period, whilst, on an application of this kind, the administrator appearing may ask for a reasonable time to make up his mind, whether he will go on with the suit or not."

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It is to be observed, that the cases mentioned by the Master of the Rolls, were all of them cases in which injunctions had been granted, and there can be no doubt that, in such cases, the practice has been in conformity with the cases cited; (*y*) his Lordship, however, thought that that was not a circumstance which made any real difference in the question; and, having regard to these cases, to the analogous cases of defect by bankruptcy, (*z*) and abatement by the marriage of a feme sole plaintiff, (*a*) he was of opinion that the motion should be granted, unless it should appear that, in consequence of the whole interest of the deceased plaintiff not being vested in his legal personal representative, some further notice is yet wanting.

According to the practice as laid down by Lord Langdale, in the above cases, it may now be taken as clear, that if, before decree, an abatement takes place in a suit, either by the death of a sole plaintiff, or by the marriage of a female plaintiff, the defendant may apply to the Court, by motion, that the representative in the first case, or the husband and wife in the second, may file a bill of revivor, within a limited time, or that the original bill may be dismissed.

So if the abatement has occurred by the death of a *defendant, his representative may, in like manner, apply to the Court, that the plaintiff may revive the suit against him or that the bill may be dismissed. (*b*)

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It is to be noticed, that in the above case, before Lord Langdale, the dismissal of the bill was without costs, the reason of which is, that otherwise the motion would be in effect a revivor for costs, (*c*) which the Court, as we have seen, does not in general permit.

The case, however, is different where the abatement has occurred by the death of one of several plaintiffs; in such cases, the practice appears to be, to order the surviving plaintiffs to file a bill of revivor within a limited time, or that, in default, the original bill may be dismissed *with costs*. (*d*)

(*y*) Stuart v. Ancell, 1 Cox, 411; Hill v. Hoare, 2 Cox, 50; Collard v. Hoare, cited ib.

(*z*) *Ante*, vol. 1, p. 79; vol. 2, 362.

(*a*) Wilkinson v. Charlesworth, Reg. Lib. B. 2359, cited Beames on Costs, (ed. 1840,) p. 131; Johnson v. Horloch, Reg. Lib. A. 134.

(*b*) If the abatement has been occasioned by the bankruptcy of a sole plaintiff, the proper application will be by motion, notice of which must be served on the assignee, that the assignees may, within a limited time, file a supplemental bill against him, or, in default, that the plaintiff's bill may be dismissed. *Ante*, vol. 1, 79; Burnell v. Duke of Wellington, 6 Sim. 461.

(*c*) *Vide* Kemp v. Mackrell, Beames on Costs, ed. 1840, p. 131. The rule is the same in the case of an abatement by bankruptcy, *ante*, vol. 1, p. 79.

(*d*) Adamson v. Hull, T. & R. 259; Chichester v. Hunter, Rolls, 2 Feb. 1841, *ex relatione* H. E. Bicknell, Reg.

It is to be observed, that if, after an order of the nature above pointed out has been made, the plaintiff files a bill of revivor, but omits to obtain an order to revive, the defendant may again move that the plaintiff may obtain an order to revive, in a given time, or that the original bill and bill of revivor may be dismissed. (*e*)

If an abatement takes place after decree, and the plaintiff files a bill of revivor, but neglects to obtain the order to revive upon the expiration of the usual time, the defendant may, if himself intitled to file a bill of revivor, move that the suit may be revived, and that he may be at liberty to carry on the suit. (*f*)

And although the general rule is strict, that, before decree, a defendant cannot sustain a bill of revivor, the case is different after decree, and the suit may be [*209] revived at the instance *of a defendant, if the plaintiffs, or those standing in their right, neglect to do it; for then the rights of the parties are ascertained, and plaintiffs and defendants are equally intitled to the benefit of the decree and have a right to revive it. (*g*)

So also, if the abatement occur by the death of a defendant, the suit may be revived at the instance of his representatives. (*h*)

Attempts have been made to limit the right of a defendant to revive, to cases in which there has been a decree for an account, in support of which a *dictum* of Lord Hardwicke, in an anonymous case in Atkyns, (*i*) has been relied upon; but it seems to be now held, that it is not in cases of account only, that a defendant can revive, but that he may do so wherever he has an interest. (*k*) He must, however, have some interest under the decree, that is, an interest in the further prosecution of the suit:—where the object of the revivor is not to continue the suit, but merely to put an end to an injunction, and to be allowed to proceed at law, a bill of revivor by the defendant will be liable to a demurrer, (*l*) and the defendant must proceed to get rid of the injunction in the ordinary way. (*m*)

It does not appear to be necessary for a defendant, who wishes to revive a suit after decree, to give notice of his intention to do so to the plaintiff's representative, although, as we have seen, (*n*) the rule is different with respect to supplemental bills.

It is to be observed, that a bill of revivor, by a defendant, merely substantiates the suit, and brings before the Court the parties necessary to see to the execution of the decree, and to be the objects of its operations, rather than to litigate the claims made by the several parties in the original pleadings, except [*210] so far as they remain undecided. (*o*) And it does not *appear, that the necessary effect of a revivor, by a defendant will be to take from the plaintiff the conduct of the cause, without an application to the Court, or to the Master, in the manner already pointed out. (*p*)

It is said by Lord Redesdale, (*q*) on the authority of *Finch* v. *Lord Winchilsea*, (*r*) that, in the case of a bill by creditors on behalf of themselves and

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(*e*) Bolton v. Bolton, 2 S. & S. 371; *sed vide* Troward v. Bingham, 4 Sim. 483, in which Sir L. Shadwell, V. C., appears to have limited the order to dismissing the bill of revivor. *Sed quære?*

(*f*) Whitebear v. Hughes, 1 Dick. 283.

(*g*) Ld. Red. 62; Kent v. Kent, Prec. in Ch. 197; 2 P. Wms. 263, n.; Anon. 3 Atk. 691; Lady Stowell v. Cole, 2 Vern. 296; Lord Stowell v. Cole, ib. 219.

(*h*) Williams v. Cooke, 10 Ves. 401. (*i*) 3 Atk. 691.

(*k*) Finch v. Ld. Winchilsea, 1 Eq. Ca. Ab. 2.

(*l*) Horwood v. Schmedes, 12 Ves. 311. (*m*) Ibid. and *vide post*.

(*n*) *Ante*, p. 173; Philipps v. Clarke, 7 Sim. 231; and *vide* Livesey v. Livesey, 1 R. & M. 10.

(*o*) Ld. Red. 62. (*p*) *Ante*, vol. 2, 792.

(*q*) Ld. Red. 63. (*r*) 1 Eq. Ca. Ab. 2.

other creditors, any creditor is intitled to revive: it seems, however, that, in practice, the form of the bill, in such case, is that of a supplemental bill in the nature of a bill of revivor, and not of a mere bill of revivor, (*s*) we have seen, however, that where one of several creditors, plaintiffs, in a suit for the administration of assets, dies, the representative of such creditor may sustain a bill of revivor, although no actual abatement of the suit has taken place. (*t*)

With respect to the persons against whom a bill of revivor should be exhibited,—if the abatement has been caused by the death or marriage of a sole plaintiff, and the suit is to be continued by the representatives of the original plaintiff, or by the husband and wife, all the defendants to the original bill must be parties to it; (*u*) and so they must, if the abatement has been caused by the death or marriage of one of several plaintiffs, and the suit is continued by the surviving plaintiffs and the representatives of the deceased plaintiff, or by the husband and wife in conjunction with the other plaintiffs. If the suit is continued, either by the surviving plaintiffs alone, or by the representatives of the deceased plaintiff alone, the representatives of the deceased plaintiff in the one case, or the surviving plaintiffs in the other, must be made defendants to the bill of revivor, in conjunction with the original defendants: thus, if one of several tenants in common, plaintiffs, dies and a bill of revivor is filed by his representatives, the survivor, if not a co-plaintiff, must be a defendant; (*x*) and so, if in the *case of the marriage of a female, one of several plaintiffs, the suit is continued either by the husband and wife alone, or [*211] by the other plaintiffs alone, the other plaintiffs in the one case, or the husband and wife in the other, must be defendants as well as the original defendants.

Where the abatement is caused by the death of a defendant the only parties necessary to be made defendants to the bill of revivor, are the representatives of the deceased defendant.

Where a bill of revivor is filed, after decree, all persons interested in carrying the decree into execution must be made parties to the bill of revivor. The bill, however, will not be liable to demurrer for want of a party who was not before the Court at the time of the abatement, although the suit may have been imperfect for want of such party, for it is not the office of a bill of revivor to correct such imperfection. (*y*)

It is to be mentioned in this place, that it may be necessary to revive a suit against the personal representatives of a deceased defendant, although such defendant has disclaimed and the plaintiff is willing to waive all relief against him. Thus where a defendant had been a party to a bill exhibited for an account of partnership dealings between himself and the plaintiff and the other defendants, and died, having put in a disclaimer to the bill, in consequence of which no bill of revivor was filed against his representative; upon an objection being taken at the hearing, because such representative was not a party, Sir John Leach, M. R., held, that the cause could not proceed without him; because, as the accounts would be taken for the benefit of all the partners, there might, in the result, be liabilities as between the deceased partner and his co-defendants, which the waiver of the plaintiff could not effect. (*z*)

It is said that if a bill be exhibited against *baron* and *feme*, and the husband dies, the suit is abated, and a bill of revivor must be exhibited against the wife, because she is not obliged to abide by the answer which was put in for her

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(*s*) *Vide* Houlditch v. Marq. of Donegall, 1 S. & S. 491, 494; and *ante*, p. 173.

(*t*) Dixon v. Wyatt, 4 Mad. 392; *ante*, p. 202.

(*u*) But if a defendant who has not answered is omitted, it will not be a ground of demurrer; Oxburgh v. Fincham, 1 Vern. 308.

(*x*) Fallowes v. Williamson, 11 Ves. 306.

(*y*) Metcalfe v. Metcalfe, 1 Keen, 74. (*z*) Glassington v. Thwaites, 2 Russ, 458.

under the power of her husband: (*a*) this, however, does not appear to be correct, *unless where a new interest arises to the wife upon the death of her husband, in which case, as we have seen, a supplemental bill must be filed against the wife, for the purpose of affording her an opportunity of putting in another defence in respect of her newly acquired interest. (*b*)

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It must be observed, however, that where a suit is founded on contract, the parties to that contract or their representatives are in general the only necessary parties, where, therefore, a bill was filed to set aside a contract that had been entered into by a defendant for the sale of his wife's estate, to which bill the wife was no party, and the defendant died, whereupon the suit was revived against his personal representative, it was contended that the wife ought to have been made a party to the bill of revivor, as she had an interest in enforcing the contract, but the Master of the Rolls, Sir T. Plumer, over-ruled the objection. (*c*) It is, nevertheless, to be recollected that, where a man and his wife are defendants, if the wife dies, there will be an abatement of the suit, and that the administrator of the wife must be made a party by revivor. (*d*)

In the above mentioned case of *Humphreys* v. *Hollis*, (*e*) it was decided, that where a bill was retained with liberty to the plaintiff to bring an action against one of the defendants, for the purpose of trying the validity of the contract, and no direction was given as to the other defendants attending the trial, the circumstance of the action having been tried after the death of one of such other defendants, and before the suit had been revived against his representatives, did not prejudice the trial, although it would have been different if the other defendants had been directed to attend. (*f*)

It may be noticed here, that a suit which has become entirely abated may be revived as to part, only, of the matter in litigation, or as to part, by one bill, and as to the other part, by another: thus if the rights of a plaintiff in a suit, upon his death, become vested, part in his real and part in his personal *representative, the real representative may revive the suit so far as concerns his title, and the personal so far as his demand extends. (*g*)

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But although a suit may be revived as to part of the matter in litigation, it cannot be revived as to part of the proceedings,—that is, a revivor cannot be made to operate from a particular period of the cause only, but the whole proceedings, bill, answer, and orders made in the cause, must stand revived; for the revivor is but a continuance of the same suit, and it cannot be a continuation of the same unless it proceeds from where the other left off. (*h*)

A bill of revivor must pursue the original bill, and if there is any variance between them, the defendant may demur. (*i*) It must state the original bill and the several proceedings thereon. (*k*) In making this statement, great conciseness is desirable, but care must be taken to set out enough of the original bill and proceedings, to shew the plaintiff's title to revive, otherwise the bill of revivor will be liable to demurrer. (*l*)

The rule with regard to this point is very clearly expressed by Lord Ch. Baron Gilbert (*m*)—"Impertinences are where the records of the Court are

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(*a*) For. Rom. 175.
(*b*) *Vide ante*, vol. 1, p. 218.
(*c*) Humphreys v. Hollis, Jac. 73.
(*d*) *Ante*, vol. 1, p. 219.
(*e*) *Ubi supra.*
(*f*) *Ante*, vol. 2, p. 765.
(*g*) Lord Red. 63; Ferrers v. Cherry, 1 Eq. Ca. Ab. 3, 4.
(*h*) For. Rom. 174.
(*i*) Prac. Reg. 91.
(*k*) Ld. Red. 59.
(*l*) Phelps v. Sproule, 4 Sim. 318; and *vide* Vigers v. Lord Audley, 9 Sim. 72, and *ante*, p. 176.
(*m*) For. Rom. 209.

stuffed with long recitals, or with long digressions of matters of fact which are altogether unnecessary and totally immaterial to the point in question, as where a bill of revivor is brought, and the party will set forth *in hæc verba*, not only the original bill and answer, but the whole proceedings in the cause; whereas all these being matters of record, and of which the party hath once paid for copies, he ought not to pay for them over again, nor is there occasion to set them forth over again *in hæc verba*, or to make an unnecessary repetition thereof, for they ought to be set forth very concise and short; as where a man brings a bill of revivor grounded upon an original bill and proceedings, he needs to set forth no more thereof, and the best draftsmen in the age have, in *that case, gone no further than thus, viz :—'*That your orator,* [*214] *in or about such a time, exhibited his original bill of complaint in this honorable Court to be relieved touching certain matters and things therein contained, as by the said bill duly filed, and remaining of record in this honorable Court appears (and carry it no further,) that the defendant, such a day, put in his answer, as by the said answer remaining of record appears. That witnesses being examined, publication passed, and the cause being at issue, came on to be heard such a day, when it was ordered and decreed, so and so.'* And here are taken in the words of the ordering part of the decree very shortly, and no more than what is material to the revivor, or if this short method is not pursued by the drawer of the bill of revivor, yet he must take care that, in the recital of the former proceedings, he does them in the shortest manner possible, (the shorter the better,) since they can be of no use to his client; for the records of the Court are the same, whether truly or falsely recited, and from them alone the fact must be determined; but if they are set forth *in hæc verba*, they are highly impertinent, and will be found so, and must be expunged with costs; for all the defendant has to do by answer to the bill of revivor, is only to set forth, that he believes there was such a suit, decree, and proceedings, and refers to the records of the Court."

The bill of revivor having stated the original bill and proceedings, must state the abatement and the plaintiff's title to revive, (*n*) and charge that the cause ought to be revived and stand in the same condition, with respect to the parties in the bill of revivor, as it was in with respect to the parties to the original bill at the time the abatement happened, and it must pray that the suit may be revived accordingly, or that the defendant may shew good cause to the contrary. (*o*) It may, likewise, be necessary to pray, that the defendant may answer the bill of revivor, as in the case of a requisite admission of assets by the representative of a deceased party. (*p*) In this case, if the defendant does admit assets, the cause may proceed against him upon an order of revivor merely; but, if he does *not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the [*215] estate of the deceased party, to answer the demands made against it by the suit; and the prayer of the bill, therefore, in such case, usually is, not only that the suit may be revived, but also that, in case the defendant shall not admit assets to answer the purposes of the suit, those accounts may be taken, and so far the bill is in the nature of an original bill. (*q*)

If a defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in

(*n*) Ld. Red. 59. As to the manner of stating a plaintiff's title, where it is derived under a probate or letters of administration; *vide ante*, vol. 1, p. 416.
(*o*) Ld. Red. 59.
(*p*) Ibid.
(*p*) Ld. Red. 60.

itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or the amendments remaining unanswered. (*r*)

If the bill seeks merely to revive the suit, it prays simply for a *subpœna* to revive; if it requires an answer, as in the case of a bill against an executor requiring him to admit assets, it should pray a *subpœna* to revive and answer.

A bill of revivor or the draft of it must be signed by counsel, and the process of filing it is the same as that of filing an original bill. (*s*)

The form of the *subpœna* upon a bill of revivor is the same as that issued upon an original bill, (*t*) except that it states the nature of the bill to which the defendant is required to appear. (*u*) It is sued out and served in the same manner as an ordinary *subpœna*, (*x*) and in the case of a Peer, &c., it must be preceded by a letter missive, the service of which must be accompanied by a copy of the bill. (*y*) The Court has refused to allow substituted service of a *subpœna* to revive upon the Clerk in Court of the original party. (*z*)

[*216] If the defendant, having been served with a *subpœna*, neglect *to appear to a bill of revivor within the time limited by the *subpœna*, (viz: four days in a town cause, and eight days in a country cause,) an attachment may be issued to take him into custody, and then, by the 8th of Lord Brougham's Orders, (*a*) if he shall be taken upon such attachment, and shall refuse or neglect to enter an appearance within eight days after the return of such attachment, the plaintiff shall be entitled, as of course, upon motion or petition, to the common order to revive.

By the same order, (*b*) it is also provided, that if the defendant cannot be found so as to be taken upon such attachment, and a return of *non est inventus* shall have been made thereon, the plaintiff, upon producing such return, and an affidavit that due diligence has been used in endeavouring to execute such attachment and that there was good reason to believe that the defendant was in the county to which such attachment issued at the time of suing out the same, shall be also intitled, as of course, upon motion or petition, at the end of eight days after the return of such attachment, to obtain the common order to revive. It is also directed that, in either of the above cases, the order shall recite, as the ground for granting the same, that the defendant is in contempt and that the time limited by the Court to shew cause against reviving the suit has expired.

It is to be remarked, that the above order enables the plaintiff in a bill of revivor to obtain the usual order to revive only, and that if an answer to the bill of revivor is required, the defendant's obedience to the *subpœna* must be enforced by the usual process of contempt. (*c*)

The order also applies only to cases in which the defendant has been served with the *subpœna*; if he absconds to avoid being served with the *subpœna*, an order may be obtained for taking the bill *pro confesso* against him under the Stat. 1 W. 4, c. 36, in the same manner as upon a defendant's absconding to avoid service of process upon an original bill. (*d*)

(*r*) Ibid.; *et vide ante*, p. 181.
(*s*) *Ante*, vol. 1, p. 507.
(*t*) *Ante*, vol. 1, p. 556.
(*u*) *Vide* Ord. 21 Dec. 1833.
(*x*) *Ante*, vol. 1, p. 560.
(*y*) *Ante*, vol. 1, p. 55. If the Peer is required also to answer original bill, he must also be served with a copy of such original bill, *ante*, p. 183.
(*z*) Brown v. Lee, 2 Dick, 545; Lee v. Warner, ib. 546.
(*a*) Ord. 1833.
(*b*) Ibid.
(*c*) *Vide ante*, vol. 1, p. 172.
(*d*) *Ante*, vol. 1, p. 277; *et vide* Henderson v. Meggs, 2 Bro. C. C. 127; James v. Dore, 1 Dick. 63.

By the 10th of Lord Brougham's Orders, (*e*) a defendant to *a bill of revivor is allowed *eight weeks* in a town cause, and *ten weeks* in a country cause to plead, answer, or demur, (not demurring alone,) to such bill. He is, however, allowed only *twelve* days to demur alone; and it is ordered, that if he do not, within *eight* days after appearance to a bill of revivor, shew cause by plea, answer, or demurrer filed, the plaintiff shall be intitled *as of course*, upon motion or petition, to the common order to revive, which order shall recite, as the ground for granting the same, that the time limited by the Court to shew cause against reviving the suit has expired. [*217]

In all cases where the suit abates, whether the abatement requires merely a bill of revivor, or of revivor and supplement, the suit must be revived by an order to revive, and it is not regular to wait till the hearing, and then to revive the suit by decree. (*f*)

We have seen before that if, after filing a bill of revivor, the plaintiff does not obtain an order to revive, upon the expiration of eight days from the defendant's appearance, the defendant may, if there has been no decree, move that the plaintiff may obtain an order to revive within a limited time, or that his bill may be dismissed, (*g*) or, if there has been a decree, may himself obtain an order to revive upon the plaintiff's bill. (*h*)

All orders for the revival of proceedings must be served on the adverse Clerks in Court, to the end that they may take notice that the suit is revived, and that such revivor is right. (*i*)

It may be inferred from the above General Order, that a defendant may shew cause against a revivor by answer as well as by plea or demurrer. This, however, is not the case, and it has been decided that, to prevent the order to revive, either a plea or a demurrer must be put in to the bill of revivor, (*k*) and that, in fact, the putting in of an answer is treated as a submission to the suit being revived, upon which, notwithstanding *any thing that may be contained in the answer, it is a matter of course to draw up the order to revive. [*218]

But, although a defendant cannot, by answer, prevent the reviving of the suit, he may, if required to answer the bill, controvert the plaintiff's title to revive in his answer, and, if he does so, and succeeds in shewing, at the hearing, that the plaintiff was not entitled to revive, the plaintiff will take nothing by his suit. (*l*)

A bill of revivor is liable to demurrer if it does not shew a sufficient ground for reviving the suit, (*m*) or any part of it, (*n*) either by or against the person by or against whom it is brought. (*o*) A demurrer will also lie to a bill of revivor brought singly for costs which have not been taxed, unless in those cases which come within the exceptions to the general rule on this subject which have been

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(*e*) Ord. 1833.
(*f*) 1 Smith, 522.
(*g*) *Ante*, p. 205.
(*h*) *Ante*, p. 208.
(*i*) 1 Harr. (ed. Newl.) p. 71.
(*k*) Harris v. Pollard, 3 P. Wms. 348; Lewis v. Bridgman, 2 Sim. 465; Codrington v. Houlditch, 5 Sim. 286. This, of course, will not apply to a plea or demurrer accompanied by an answer, in which case the plea or demurrer must be disposed of before the answer can be acted upon.
(*l*) Harris v. Pollard, 3 P. Wms. 348; Ld. Red. 61.
(*m*) Harris v. Pollard, *ubi supra*; Hamphreys v. Incledon, 1 Dick. 38.
(*n*) 1 Eq. Ca. Ab. 3, 4.
(*o*) University Coll. v. Foxcroft, 2 Ch. Rep. 244.

before pointed out. (*p*) The want of parties is also a ground for demurring to a bill of revivor, though, as we have seen, it cannot be demurred to for want of a party who was not before the Court at the time of the abatement; (*q*) or who has not appeared to the original bill. (*r*)

If a bill of revivor is brought without sufficient cause to revive, and this is not apparent on the bill, the defendant may plead the matter necessary to shew that the plaintiff is not entitled to revive the suit against him, (*s*) or, if the plaintiff is not entitled to revive the suit at all, though a title is stated in the bill so that the defendant cannot demur, the objection to the plaintiff's title may, also, be taken by way of plea. (*t*)

The question whether a plea of the Statute of Limitations, 21 Jac. 1, c. 16, will apply to bills of revivor has been the subject of considerable discussion. [*219] Lord Redesdale, however, *states (*u*) that if a person, entitled to revive a suit, does not proceed in due time, he may be barred by the Statute of Limitations which may be pleaded to a bill of revivor afterwards filed. In support of this proposition, however, his Lordship refers to *Hollingshead's case*, (*x*) which, although a case in point as to the general principle, yet establishes a very important distinction, (*y*) viz: that where the bill of revivor is after a decree to account, it is not within or barrable by the Statute of Limitations: though the demand may be a very stale one, and not to be encouraged.

It is to be recollected, that a defendant to a bill of revivor cannot plead to the original bill a plea which has been pleaded by the original defendant and overruled, although if a plea has been put in, and the original defendant has died before argument, the defendant may plead the same matter *de novo*. (*z*)

Pleas and demurrers, as well as answers, to bills of revivor are subject to the same rules, as well of pleading as of practice, as pleas and demurrers to original bills.

It seems to have been thought that a defendant could only object to a revivor by way of plea or demurrer, (*a*) and there may be great convenience in thus making the objection, for, as we have seen, if the defendant objects by answer, it will not prevent the order to revive, (*b*) and the point can only be determined by bringing the cause regularly to a hearing; whereas, if the objection is taken by plea or demurrer, it may, in general, be immediately determined in a summary way, (*c*) and before the order to revive has been obtained, provided the plea or demurrer be filed within eight days after appearance. (*d*)

(*p*) *Ante*, p. 199; Ld. Red. 164.
(*q*) Metcalfe v. Metcalfe, 1 Keen, 74; *ante*, p. 211.
(*r*) *Ante*, p. 201.
(*s*) Ld. Red. 233; Harris v. Pollard, 3 P. Wms. 348.
(*t*) Ibid. (*u*) Ld. Red. 234.
(*x*) 1 P. Wms. 743.
(*y*) *Vide etiam* Hovenden v. Lord Annesley, 2 Sch. & Lef. 607; Egremont v. Hamilton, 1 B. & B. 524; Onge v. Truelock, 2 Moll. 31. It seems, however, that, after a great lapse of time, it is in the discretion of the Court to be regulated by circumstances, whether relief shall be given. Hollingshead's case, *ubi supra*; Hovenden v. Lord Annesley, *ubi supra*; Lord Egremont v. Hamilton, *ubi supra*.
(*z*) *Ante*, vol. 2, p. 230. (*a*) Harris v. Pollard, 3 P. Wms. 348.
(*b*) *Ante*, p. 217. (*c*) Ld. Red. 234.
(*d*) *Ante*, p. 217.

But although where an answer is called for, the defendant may, by it, object to the revivor, yet, if it be a mere bill of *revivor, in which the [*220] question between the parties is simply as to the right to revive, an answer, unless required by the bill, is unnecessary. When an answer is required, it must be confined to such matters as are called for by the bill or would be material to the defence with reference to the order made upon it. Upon this ground it has been held, that where a defendant to a bill of revivor inserted in his answer a variety of matters which, if stated in answer to the original bill might have been a good defence to that bill, but was not relevant to the question of revivor, the answer was, to that extent, impertinent. (*e*) And so, where the answer to a bill of revivor set out a detailed account of the proceedings which had taken place in the suit for the purpose of objecting to them as irregular and oppressive, and it was insisted that some of the orders which had been made in the cause ought to be set aside, and that money which had been paid out of Court under them brought back; it was held, upon exceptions to the Master's report, upon a reference for impertinence, that such statements in the answer, were impertinent. (*f*)

An answer, however, to a bill of revivor will not be impertinent, if it states matters of defence which have occurred since the answer to the original bill was filed, although such matters do not affect the title of the plaintiff to revive; therefore, where the defendants to a bill of revivor, in addition to answering the statements in the bill, stated that they had become bankrupts, and had obtained their certificates, and claimed the benefit of the statutes in force relating to bankrupts, and the plaintiffs excepted to this part of the answer for impertinence, the Vice Chancellor confirmed the Master's report over-ruling the exceptions. (*g*)

An answer to a bill of revivor is liable to exceptions for impertinence and insufficiency the same as an answer to an original bill; but it is to be noticed, that if an executor or administrator, *by his answer admits assets, [*221] and the plaintiff, upon coming in of the answer, revives his suit, and proceeds in the original cause upon the revivor, he shall never afterwards refer the answer for insufficiency; "for this he ought to have done at first, and before he proceeded to revive the original cause; his doing whereof is an admission that the answer was full and perfect, or otherwise he might have excepted thereto, and had the opinion of the Court thereon; but then he could not have proceeded to revive till he had got over that point." (*h*)

An answer to a bill of revivor, like all other pleadings, must be signed by counsel, and may be put in and filed in the same manner as other answers, which it resembles in all other points.

If the answer does not admit the plaintiff's title to revive, or states any circumstances which the plaintiff is desirous of controverting, it must, if the abatement has taken place after decree, or after issue joined in the original cause, be replied to, and *subpœnas* to rejoin served, after which the proceedings upon it will be the same as upon an original bill. (*i*)

If the bill of revivor is filed before decree, or before issue joined in the original cause, a separate replication will be unnecessary, and the revived suit and the original suit may be set down under one certificate. (*k*)

(*e*) Nanney v. Totty, 11 Price, 117. For the method of expunging impertinence, *vide ante*, vol. 1, p. 457.

(*f*) Wagstaff v. Bryan, 1 R. & M. 28.

(*g*) Langley v. Overton, 9 Law, J. Chan. 27. *Sed quære*, whether the proper course would not have been to have pleaded the bankruptcy of the defendants as a cause why the suit should not be revived against them.

(*h*) For. Rom. 180.

(*i*) 1 Smith, 523.

(*k*) Catton v. Earl of Carlisle, 5 Mad. 427; *et vide* 1 Smith, 523.

With respect to the necessity for setting down a bill of revivor for hearing it must depend upon whether the object of the bill has been accomplished by the order to revive. If it merely prays that the suit may be revived, a hearing will be unnecessary, as the object will be completely effected by the order to revive, and if, under such circumstances, the revivor suit is brought on for hearing, the plaintiff will have to pay the costs. This will apply equally to cases in which the bill of revivor is filed by the plaintiff, or those who represent him, or, after decree, by a defendant, or those who represent him, the mere order to revive will, in such case, be effectual against both plaintiffs and co-defendants. (*l*)

[*222] *It is, however, to be observed, that, although, where a bill seeks a revivor only, a mere order to revive will obviate the necessity for setting down the revivor for hearing, this will not be the case if the defendant is called upon to answer, and by his answer controverts the right to revive. In such case, the revivor suit must be set down for hearing, notwithstanding the order to revive has been obtained; (*m*) and it is to be noticed, that, wherever the bill contains supplemental matter, as well as matter of revivor, a hearing will be necessary; and that the bill of revivor must, in such case, be set down for hearing, as well against the party to the revivor, as against the party to the supplemental matter. Thus, where a bill was filed, which was supplemental against the heir, but was a mere bill of revivor with respect to the administratrix, against whom the common order to revive had been made, the Vice Chancellor held that the cause must be set down to be heard against the administratrix as well as against the heir, although if it had been a simple bill of revivor against the administratrix, a hearing would have been unnecessary. (*mm*)

If the bill of revivor prays for an admission of assets by the representative of a deceased party and the defendant admits assets, the cause may proceed against him, upon the order of revivor merely; but, if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estates of the deceased party, to answer the demands made against it. (*n*)

It has been recently held, by the Court of Exchequer, that where the decree in the original suit contains a specific direction, (as that the defendant shall pay a certain sum of money,) that direction cannot be carried into execution by the mere order to revive, but that a decree must be made in the revived suit for the purpose. (*nn*)

If the bill of revivor is filed before the decree, it may, if the original cause has not been set down for hearing, be set down together with it, but if the original cause has been already set down, it must be set down separately, and,

[*223] in *respect to all fees and charges, it is considered as a separate cause until the decree. (*o*)

If there has been a decree in the original cause, the bill of revivor must, if necessary to be heard, be set down separately, or it may be so set down that it shall come on for hearing with the cause upon further directions.

It may be mentioned here, that where an abatement takes place after the original cause has been set down, and the *subpœna* to hear judgment served, and the suit is afterwards revived by order, no new *subpœna* to hear judgment is necessary in the original cause, (*p*) unless there are new parties introduced

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(*l*) Pruen v. Lunn, 5 Russ. 3.
(*m*) Harris v. Pollard, 3 P. Wms. 348; Seton on Decrees, 385.
(*mm*) Lake v. Austwick, 4 Jurist, 314. (*n*) Ld. Red. 60.
(*nn*) Harries v. Johnson, 3 Y. & C. 583. (*o*) 1 Smith, 523.
(*p*) Bray v. Woodran, Mad. and Geld. 72; *sed vide contra* Cockburn v. Raphael, 4 Sim. 18.

by the revivor, in which case, such new parties must be served with a *subpœna*, although the other defendants need not. (*q*)

If the abatement is general and it is necessary to set the bill of revivor down for hearing, *subpœnas* to hear judgment in the revivor suit must be served, even though it may not be necessary to serve *subpœnas* in the original suit. (*r*)

It may be useful to the practitioner, before concluding this section, to direct his attention to some of the ordinary effects of abatement and revivor, upon the proceedings in the cause.

Where the abatement is total, *i. e.*, where it is caused by the death, bankruptcy, insolvency, or marriage of the plaintiff, (being a female,) the cause is completely suspended and cannot be proceeded in, till it has been revived, or the defect, caused by the abatement, cured by supplemental bill, and, in general, all orders made pending such abatement, will be considered nugatory, and may be discharged. The same rule will also apply where the abatement has been caused by the death of one or more plaintiffs. Thus if, pending a total abatement, process of contempt is issued, it will be irregular, and may be discharged on motion with costs, and if a defendant is arrested *on any process [*224] pending such abatement, he will be discharged, from such arrest, with costs. (*a*) So also, an order to dismiss a bill for want of prosecution, obtained pending an abatement will, as we have seen, be irregular. (*b*)

It is to be observed, however, that, although the general rule is as above stated, there are many cases in which the Court will entertain applications although the suit is abated. Thus it will entertain a motion to discharge process of contempt issued or executed pending an abatement; so also, although no regular order to dismiss a bill for want of prosecution can be obtained before revivor, the Court will, as we have seen, if the plaintiff, or his representatives, or the surviving plaintiffs, omit to revive the suit within a reasonable period, make an order that they shall file a bill of revivor within a limited time or else that the bill shall be dismissed. (*c*)

It has, also, where the right to money in Court has been clear under former orders and reports, made an order upon petition for payment of the money out of Court, to the party entitled without regarding the abatement, (*d*) or for the delivery of deeds and writings brought into Court, or it will send it to the Master for inquiry to whom they belong. (*e*)

We have seen also, that a commission to examine witnesses abroad will not be affected by an abatement of the suit, and that depositions taken under it, (provided neither the commissioners nor the witnesses have received notice of the abatement,) will be good. (*f*)

An inrolment of a decree may also be made, and an order to do so, *nunc pro tunc*, may be made, notwithstanding an abatement. (*g*)

Where, however, the suit abates after a decree has been pronounced, but before it is passed, there must be a revivor before it can be passed. (*h*)

(*q*) 1 Smith, 403.
(*r*) Ibid.
(*a*) Wilson v. Metcalfe, MSS.
(*b*) *Ante*, vol. 2, p. 359.
(*c*) *Ante*, p. 205.
(*d*) Roundell v. Currer, 6 Ves. 250; *vide etiam* Beard v. Earl Powis, 2 Ves. 399.
(*e*) Wharam v. Broughton, 1 Ves. 185.
(*f*) *Ante*, vol. 2, p. 539; *vide etiam*, Sinclair v. James, 1 Dick. 277; Thompson v. Took, ibid. 115; Peters v. Robinson, ibid. 116.
(*g*) *Ante*, vol. 2, 679.
(*h*) Bertie v. Ld. Falkland, 1 Dick. 25.

[*225] *It is to be recollected that the Statute of Limitations will run, pending an abatement, in all cases except a decree to account. (*i*)

For the effect of an abatement upon a sequestration to enforce an answer to a decree, the reader is referred to former parts of the present Treatise. (*k*)

It is to be observed, that an abatement, although it suspends proceedings in a cause, does not put an end to them; therefore, where process of contempt has been executed, and a defendant is in custody upon it, and afterwards the suit abates, the defendant is not thereby entitled to his discharge out of custody, but he must move that the plaintiff may revive within a limited time, or that the bill may be dismissed and he may be discharged. So also, an injunction is not dissolved by an abatement, but the defendant must, if he wishes to get rid of the injunction, move that the plaintiff may revive within a limited time, or that the injunction may be dissolved. (*l*) The same observations apply to receivers appointed under an order of the Court, who are not discharged on abatement without an order of the like description.

Where an abatement is partial, *e. g.* where it is caused by the death of a defendant, it prevents those proceedings only by which the interest of the deceased defendant may be affected; for the death of a defendant makes an abatement *quoad* himself alone: therefore, if there be a decree against trustees and their *cestui que trust* to convey, and the *cestui que trust* dies, the trustees may be compelled to convey, notwithstanding his death. (*m*) So also, pending an abatement, by the death of a defendant, process of contempt may be issued and executed against the other defendants; and, we have before seen, that, during such an abatement, the Court will, at the instance of a creditor, take the prosecution of a decree from the plaintiff. (*n*)

[*226] *It has, also, been held, that the death of a defendant, after hearing but before judgment, does not necessarily prevent judgment; (*o*) but where, upon a motion to dismiss for want of prosecution, the plaintiff appears and undertakes to set the cause down for hearing within a limited time, in default of which the bill is to stand dismissed, and afterwards the defendant dies, and the time for setting the cause down expires before the suit can be revived, the order dismissing the bill is suspended during the abatement. (*p*)

We have already seen (*q*) that where a bill against several defendants is retained, with liberty for the plaintiff to bring an action against one of them, the trial may take place during an abatement occasioned by the death of another defendant, provided such other is not directed by the decree to attend the trial, in which case a trial before the suit is revived against such defendant will be irregular.

Where the abatement of a suit is total, an order to revive places the suit and all the proceedings in it, in precisely the "same plight, state, and condition that the same were in at the time when the abatement took place," (*r*) and the

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(*i*) Hollingshead's case, 1 P. Wms. 743, *ante*, p. 219.

(*k*) *Ante*, vol. 1 p. 650, and vol. 2, p. 718.

(*l*) *Ante*, p. 207, and *vide post*—"Injunctions." This will not apply to injunctions made perpetual by decree; *vide* Askew v. Townsend, 2 Dick, 471, and *post*.

(*m*) Finch v. Ld. Winchelsea, 1 Eq. Ca. Ab. 2.

(*n*) *Ante*, vol. 2, p. 793. (*o*) Davies v. Davies, 9 Ves. 461.

(*p*) Gregson v. Oswald, 1 Cox, 344. For the effect of an order to dismiss, obtained pending an abatement, *vide ante*, vol. 2, p. 359.

(*q*) *Ante*, p. 212. (*r*) Gregson v. Oswald, 1 Cox, 343.

new plaintiff may take the same proceedings in the cause that the original plaintiff might have done; thus the plaintiff in a revived suit may amend the original bill in the same manner that the original plaintiff might have done, and may issue an attachment against the defendant for not answering the amended bill. (*s*) So also, the new plaintiff may prosecute process of contempt against the defendant, taking it up where it left off at the abatement; and if a process has been issued before the abatement, it will be revived by the order to revive. (*t*)

The case is different where the abatement is occasioned *by the death of a defendant; in such case, the process being personal, [*227] cannot be revived. (*u*) In general, however, where an abatement is occasioned by the death of a defendant, the order to revive against the representatives of such defendant will place the suit as fully in the same position with regard to such representatives as can be done, with reference to the change of the individuals before the Court.

SECTION IV.

Bills in the Nature of Bills of Revivor.

A bill of revivor, properly so called, lies only in cases where a death intervenes, and it is necessary to bring the proper representatives, whether real or personal of the deceased party, before the Court; or where, by reason of the marriage of a female plaintiff, her rights are so modified that the suit cannot be carried on by herself alone, but her husband becomes a necessary party. (*a*) In each of these cases there is no other fact to be ascertained, than whether the new party brought before the Court, has the character imputed to him. If he has, the revivor is of course: but there are many cases in which there are other facts which may be brought into litigation, besides the mere question of the character of the new party; and to such cases, therefore, the simple bill of revivor does not technically apply. Under such circumstances, *an original bill in the nature of a bill of revivor*, is the appropriate process to bring these facts before the Court, and to put the original proceedings again in motion, and enable the new party to have the benefit of the former proceedings. (*b*)

Thus, if the death of a party, whose interest is not determined *by his death, is attended with such a transmission of his interest [*228] that the title to it, as well as the person entitled, may be litigated in the Court of Chancery; as in the case of a devise of a real estate, the suit cannot be continued by a mere bill of revivor. An original bill, upon which the title may be litigated, must be filed; and this bill will have so far the effect of a bill of revivor, that, if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill, as if the suit had been continued by a bill of revivor. (*c*)

(*s*) Ld. Red. 62; Philips v. Darbie, 1 Dick. 98.

(*t*) Hyde v. Forster, 1 Dick. 134.

(*u*) *Vide ante*, vol. 1, p. 651; a difference, however, as to practice, exists between sequestrations upon *mesne* process and sequestrations to enforce the performance of a decree or order; *ante* vol. 2, p. 717.

(*a*) *Ante*, p. 200.

(*b*) Ld. Red. 55, 76; Prac. Reg. 90, 91; Story's Eq. Pl. 249.

(*c*) Ld. Red. 55; Clare v. Wordale, 1 Eq. Ca. Ab. 3; 2 Vern. 548; S. C.; Prac. Reg. 90; Jones v. Jones, 3 Atk. 217; Lord Redesdale repeats the same proposition, with some

The distinction, between bills of revivor and bills in the nature of bills of revivor, seems to be, that the former, in case of death, are founded upon privity of blood or representation by operation of law; the latter, in privity of estate, or title by the act of the party. (*d*) In the former case, nothing can be in contest except whether the party be heir or personal representative; in the latter the nature and operation of the whole act, by which the privity of estate or title is created, is open to controversy: (*e*) thus, for example, the heir [*229] *may be made a party by a bill of revivor, for his title is by mere operation of law; but the devisee must come in by a bill in the nature of a bill of revivor; for he comes in as a purchaser under the testator, in privity of estate or title which may be disputed. (*f*)

The bill is said to be original, merely for want of that privity of title between the party to the former bill and the party to the latter bill, though claiming the same interest, which would have permitted the continuance of the suit by a bill of revivor; therefore, when the validity of the alleged transmission of interest is established, the party to the new bill will be equally bound by, or have advantage of, the proceedings on the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest; (*g*) and the suit is considered as pending from the filing of the original bill, so as to save the Statute of Limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross bill, and every other advantage, which would have attended the institution of the suit by the original bill, if it could have been continued by bill of revivor merely. (*h*)

It has been remarked, by Lord Redesdale, that there seems to be this difference between *an original bill in the nature of a bill of revivor* and an original bill in the nature of a supplemental bill: upon the first, the benefit of the former proceedings is absolutely obtained; so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same

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slight alterations, in p. 76 of his treatise: his language there is—"It has been already mentioned, that when the interest of a party dying is transmitted to another, in such a manner that the transmission may be litigated in this Court, as in the case of a devise, the suit cannot be revived by or against the person to whom the interest is so transmitted, but that such person, if he succeeds to the interest of a plaintiff, is intitled to the benefit of the former suit; and if he succeeds to the interest of a defendant, the plaintiff is intitled to the benefit of the former suit against him, and that this benefit is to be obtained by an original bill in nature of a bill of revivor."

(*d*) Prac. Reg. 90.

(*e*) Lord Ch. Baron Gilbert, in his Forum Romanum, 172, states the reasons thus:—"This subpœna is only for the heir, executor, or administrator, who came in in privity, as they call it, that is, in immediate representation to the party litigant deceased; for a devisee or assignee of any plaintiff cannot have subpœna *ad revivendum*, after the decease of such plaintiff, and this is for two reasons: first, because they looked upon a suit to be a chose in action which was not assignable over for fear of maintenance: but this reason has been long since obsolete in the Court of Chancery, where they allow the assignment of such interest: but the second and better reason is, because, where the party devises or assigns his interest and dies; if the devisee or assignee were to bring his bill of revivor against the defendant, the heir or executor would be pretermitted, who might have a right to contest such disposition, and therefore he must bring his original bill, and make the heir or executor a party."

(*f*) Story's Eq. Pl. 251; Coop. Eq. Pl. 63, 69, 77; For. Rom. Ch. 9, p. 172; Prac. Reg. 90; 1 Eq. Ca. Ab. 2, B. Pl. 1; Harrison v. Ridley, 2 Eq. Ca. Ab. 3; Comyn's R. 589, S. C.

(*g*) Lord Red. 77; Clare v. Wordale, 2 Vern. 548; 1 Eq. Ca. Ab. 83; sub. nom. Vare v. Wordall; Mordaunt v. Minshull, 6 Bro. P. C. 32, Ed. T'oml.; Johnson v. Northey, Prec. in Ch. 134; 2 Vern. 407, S. C.; Houlditch v. Marq. of Donegall, 1 S. & S. 495.

(*h*) Ld. Red. 77; Child v. Frederick, 1 P. Wms. 266.

manner as if filed or taken in the second cause; and if any decree has been made in the first cause, the same decree shall be made in the second: but in the other case a new defence may be made; the pleadings and depositions *cannot be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the Court to make a similar decree. (*h*) [*230]

A bill in the nature of a bill of revivor cannot be brought, except by some person who claims in privity with the plaintiff in the original bill: thus, for example, if a bill is filed by a devisee under a will, and afterwards a subsequent will is proved, by which the same property is devised to another devisee; in such a case, the latter devisee cannot, by a bill in the nature of a supplemental bill, avail himself of the proceedings in the original suit; for there is no privity between the plaintiff in the original suit, and the plaintiff in the supplemental bill; but if the bill had been filed by the devisor himself for some matter touching the estate devised, then the second devisee might file a supplemental bill in the nature of a bill of revivor, notwithstanding the first devisee has already filed such a bill; for he derives his title solely from the devisor, independently of the first devisee. (*i*)

An original bill in the nature of a bill of revivor should generally state the same facts as a bill of revivor; it should state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party deceased has been transmitted; it must also charge the validity of the transmission and state the rights which have accrued by it. (*k*) The bill should also pray, that the suit may be revived and the plaintiff have the benefit of the former proceedings therein.

Bills of this description are liable to demurrers or pleas on the same grounds as original bills and bills of revivor, of whose nature they partake, and the practice, as to demurring, pleading, and answering them, is the same, in all respects, as the practice upon original bills. Indeed, in all other respects, the practice upon these bills is the same as upon original *bills, and they must be brought on for hearing in the same manner before any benefit can be derived from them; a revivor, in such cases, being only obtained by decree, and not by an order to revive, as in the case of an ordinary bill of revivor. [*231]

Supplemental bills in the nature of a bill of revivor have been before attended to. The cases where they are applicable are those in which there is an abatement of the suit, but the person by or against whom the suit is to be continued, although claiming under the individual in respect of whom the abatement has occurred, is not the representative whom the law allows recognized, but is one whose person or title which cannot be litigated in this Court but may be disputed before another tribunal. Thus, where a defendant to a suit becomes bankrupt or insolvent, the suit which has become abated by the bankruptcy or insolvency, may, as we have seen, be continued against his assignees by a supplemental bill, which is to this extent in the nature of a bill of revivor. (*x*) So where the interest of a person suing or sued in *autre droit* is

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(*h*) Ld. Red. 57, and *vide ante*, p. 189.

(*i*) Oldham v. Eboral, Coop. Sel. Ca. 27; Rylands v. Latouche, 2 Bligh, 585; Tonkin v. Lethbridge, Coop. Rep. 43.

(*k*) Ld. Red. 97; Phelps v. Sproule, 4 Sim. 318.

(*x*) *Ante*, p. 201.

determined by death, as in the case of an assignee or personal representative or the committee of a lunatic, the decease of the party suing or sued causes an abatement of the suit, which, however, cannot be remedied by bill of revivor, but by supplemental bill, which, from its performing the office of a bill of revivor, is designated a supplemental bill in the nature of a bill of revivor. In all these cases, however, the bill, although designated as being in the nature of a bill of revivor, is neither more nor less than a supplemental bill.

[*232] *SECTION V.

Bills of Revivor and Supplement.

If a suit becomes abated, and, by any act besides the event by which the abatement happens, the rights of the parties are affected, as by a settlement, (*a*) or a devise, under certain circumstances, (*b*) though a bill of revivor merely may continue the suit so as to enable the parties to prosecute it, yet, to bring before the Court the whole matter necessary for its consideration, the parties must, by supplemental bill, added to and made part of the bill of revivor, shew the settlement or devise or other act by which their rights are affected; and, in the same manner, if any other event which occasions an abatement is accompanied or followed by any matter necessary to be stated to the Court, either to shew the rights of the parties or to obtain the full benefit of the suit, beyond what is merely necessary to shew by or against whom the cause is to be revived, that matter must be set forth by way of supplemental bill added to the bill of revivor. (*c*)

A bill of revivor and supplement is merely a compound of these two species of bills, and must be framed and proceeded upon in the same manner. (*d*) They are each liable to the same description of defence as the bills, if separate, would be liable to; and it is to be recollected, that, in all cases where there is a bill of revivor and supplement, the case must be set down for hearing against all the parties, although the bill is only a bill of revivor against one, and an order to revive has been obtained. (*e*)

[*233] *CHAPTER XXX.

OF AFFIDAVITS.

Having, in pursuance of the original arrangement of the present Treatise, conducted the reader through a suit in Chancery in all its ordinary stages, from the bill to the final decree, and, having directed his attention to the practice arising in consequence of those incidental occurrences by which a suit may become defective or abated, the Author proposes now, in further prosecution of his plan, to direct the practitioner's attention to those applications which may

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(*a*) See Merryweather v. Mellish, 13 Ves. 161.

(*b*) See Rylands v Latouche, 2 Bligh, 566.

(*c*) See Russell v. Sharp, 1 Ves. & B. 500. It is not necessary that the supplemental matter should arise out of or be consequent upon the abatement; any matter which it would be proper to introduce by supplemental bill, may be added to a bill of revivor, and so constitute a bill of revivor and supplement. (*d*) Ld. Red. 63.

(*e*) Lake v. Anstwich, 30 Jan. 1840, 4 Jurist, 314.

be made to the Court in the progress of a cause for the purpose of obtaining from it orders not immediately necessary to the regular progress of the suit, but for which a necessity arises from some collateral matter consequent upon the pleadings or process or other circumstances of the case. Applications of this nature are usually termed interlocutory applications, and the investigation of the rules which govern the Court in granting them, will form the subject of some of the following chapters: but as it frequently happens that applications of this nature are supported by evidence, not elicited by interrogatories in the ordinary manner of taking evidence in the Court, but offered to the Court in the form of a written declaration, either by a party making the application, or a stranger, (which form of evidence has frequently been alluded to in the present Treatise;) the writer conceives that before he enters into the consideration of interlocutory applications in general, it will not be considered out of its place here, if he devotes a few pages to the discussion of the rules by which the practice relating to *affidavits* is regulated.

An affidavit then is a declaration upon oath or affirmation, (*a*) *before some person having competent and lawful power and authority to administer the same. (*b*) [*234]

When they are made within ten miles of Lincoln's Inn Hall, (*c*) they must be sworn before a Master in ordinary, either at the public office, or at the Master's Chambers; or, if out of the usual office hours, at a Master's private residence. (*d*)

In the country they are sworn before a Master extraordinary, but, in that case, the place where it is sworn must be at a distance not less than ten miles from Lincoln's Inn Hall. (*e*)

It is to be observed, also, that the Master extraordinary, before whom the affidavit is sworn, must not be a solicitor in the cause, and that, in a case before Lord Hardwicke, where the affidavits, in support of a petition, had been sworn before the petitioner's solicitor, the petition was dismissed and the costs were directed to come out of the solicitor's pocket. (*f*)

Formerly when the affidavit of a person under confinement in any prison in London was required, it was necessary that a Master in ordinary should attend in the prison for the purpose of taking and receiving such affidavit; but by Sir Edward Sugden's Act, 1 W. 4, c. 36, s. 15, rule 20, it is provided, that, "in order to relieve persons in prison from the expense of a Master's attendance to take affidavits or answers, the Lord High Chancellor shall, by one or more commission or commissions under the Great Seal, under or in respect of which no fee shall be payable, nominate and appoint the Warden or Keeper or other chief officer of any prison or prisons within the city of London or the bills of mortality, and their deputies, to be Masters extraordinary of the High Court of Chancery, for the purpose of taking and receiving such *affidavits* and answers as any person or persons within such prison or prisons shall be willing or desirous to make and for no other purpose; and it is further provided, that the person so taking such affidavit or answer, shall, in respect *thereof, be intitled to receive a fee of one shilling and no more." [*235]

It may be observed in this place, that, although when affidavits are made by persons resident within the jurisdiction of the Court, they are required to be

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(*a*) A person professing to be a Quaker or Moravian may make affidavit upon solemn affirmation, *vide* 7 & 8 W. 3, c. 34; 3 & 4 W. 4, c. 49; which privilege has since been extended by 1 & 2 Vict. c. 77, to persons who, having been Quakers or Moravians, have ceased to belong to such sects, but continue to have conscientious objections to the taking of an oath.

(*b*) Hind. 451.

(*c*) Ord. 1833, XXXIII.

(*d*) Hind, 451.

(*e*) Ord. 1833, XXXIII.

(*f*) *In re* Hogan, 3 Atk. 812.

sworn before a Master either *in ordinary* or *extraordinary*, according to the distance of the place of swearing from London, the Court of Chancery is in the habit of receiving affidavits made by parties resident out of the jurisdiction, though necessarily not sworn to before either of those functionaries, provided it is shewn that the persons before whom they are sworn are persons who, by the law of the country in which the affidavit is sworn, are authorized to administer an oath: thus an affidavit sworn before a Master in ordinary or a Master extraordinary of the Court of Chancery in Ireland has been permitted to be read in this Court. (*g*) So also, has an affidavit sworn before a Baron of the Exchequer in Scotland. (*h*) It should be mentioned here, that in *Hyde* v. *Whitfield*, (*i*) Lord Eldon is reported to have said, that although the Courts have, of late, acted upon affidavits made before the superior Courts in Scotland, he did not recollect an instance of the Court taking notice of an affidavit sworn before a Justice of the Peace in Scotland. It appears, however, that his Lordship's memory in that case was not quite accurate, for, in *Pinkerton* v. *the Barnsley Canal Company*, (*k*) he made an order, upon an application which was opposed, that the Master should, in a matter pending before him, be at liberty to receive an affidavit sworn before a Justice of the Peace in Scotland, upon its being verified to the satisfaction of the said Master, that the person, before whom the affidavit purported to have been made was, according to the laws of Scotland, qualified to administer an oath and upon the signature of such person to the *jurat* of the affidavit being verified. Upon the authority of this case, Sir W. Alexander, L. C. B., permitted an affidavit, sworn by a defendant before a Magistrate in Scotland, to be read upon a motion in the *Court of Exchequer, and it may be assumed that the Court of Chancery would be guided by the same precedent. (*l*)

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The directions contained in Lord Eldon's order in *Pinkerton* v. *the Barnsley Canal Company*, (*m*) point out very clearly the terms upon which the Court will receive an affidavit sworn out of the jurisdiction of the Court, viz: that *it should be shewn that the person before whom the affidavit purports to have been sworn, is, according to the law of the country in which it is sworn, qualified to administer an oath, and that the signature of such person should be properly verified.*

Upon this principle the Court acted in *Chicot* v. *Lequesne*, (*n*) in which it ordered an affidavit as to the production of books by a party resident in Holland, to be sworn before a Notary Public at Amsterdam, with the intervention of a proper Magistrate, if necessary by the law of Holland, to the administration of the oath.

The object in requiring the affidavit, in the above case, to be sworn before a Notary Public, was to enable the Notary to verify the transaction under his official seal, (*o*) "for, as by the law of nations a Notary Public has credit every where, the Court will give credit to him." (*p*)

(*g*) Sergison v. Sergison, cited 1 J. & W. 296; and Annesley v. Earl of Anglesey, 1 Dick. 90.

(*h*) Braham v. Bowes, 1 J. & W. 296.

(*i*) 19 Ves. 344.

(*k*) 3 Y. & J. 277, *notis*.

(*l*) Ellis v. Sinclair, 3 Y. & J. 273.

(*m*) *Ubi supra*.

(*n*) 1 Dick. 150.

(*o*) *Vide* Sir J. Walrond v. Jacob, 12 Vin. Ab. Ev. p. 123; A. b. 51, pl. 2, 8 Mod. 323; where the Court held that a plaintiff who was in Holland might make affidavit there, and get it attested by a Notary Public, and that it should be admitted as evidence to hold the defendant to special bail.

(*p*) Hutcheon v. Mannington, 6 Ves. 823. The Court will, also, admit the certificate of a Notary, under his seal, in proof of the execution abroad of a power of attorney to receive money from the Accountant General. *Vide post*, Payment of Money out of Court.

It is, however, to be observed that although the Court will, in cases of this description, give credit to the fact, as certified under the notarial seal of a Notary Public, it will require some evidence that the person, whose seal is affixed, actually fills the character he assumes; this may be effected either by the production of an affidavit by some person resident in this country who can depose to the fact of his being a Notary Public, or by the certificate of some public officer of the country in which the transaction *took place, competent to give such certificate, (*q*) which certificate must, how- [*237] ever, be verified by the affidavit of some person resident here, conusant of the fact that the public officer who certifies is what he assumes to be. (*r*)

Thus, where a certificate that an affidavit was sworn before a Magistrate in Prince of Wales's Island, in the East Indies, was signed and sealed by the Magistrate himself and by a Notary Public, the Lord Chancellor thought the evidence not sufficient; observing that, although a Notary Public by the law of nations has credit everywhere, and the Court, therefore, will give credit to him, yet it was necessary to prove that the other person was a Magistrate. (*s*)

So also, where an affidavit purported to be sworn before the Mayor of Georgetown, in Columbia, in the United States, whose signature and seal were affixed, the Master of the Rolls, Sir T. Plumer, held, that although the affidavit purported to have been sworn before a person calling himself Mayor, &c., there was no evidence to shew who he was, and that something further was necessary to verify it. (*t*)

It is to be observed that, by the 6 Geo. 4, c. 87, s. 20, every *Consul General* or *Consul* appointed by the sovereign of this country, at any foreign port or place, is authorized and empowered *whenever he shall be thereunto required and whenever he shall deem it necessary*, to administer at such foreign port or place, any oath, or take any affidavit or affirmation from any person or persons whomsoever, and also to do and perform, at such foreign port or place, all and every notarial acts or act which any Notary Public could or might be required to do within the United Kingdom of Great Britain and Ireland: and it is enacted that every such oath, affidavit or affirmation, and every such notarial act, administered, sworn, affirmed, had, or done by or before such Consul General or Consul, shall be as good, valid, and effectual, and shall be of like force and effect to all intents and purposes, as if any such oath, affidavit, or affirmation, or notarial act respectively, had been *administered, sworn, affirmed, had, or done, before any Justice of the Peace or Notary Public in [*238] any part of the United Kingdom of Great Britain and Ireland, *or before any other legal or competent authority of the like nature.* Under this act, therefore, affidavits sworn before any Consul General or Consul of her Majesty, resident at any port or other place abroad, may be received as evidence in the Court of Chancery, upon producing evidence to prove the signature of such Consul General or Consul to the *jurat*, and that the person signing the same is such Consul General or Consul; an affidavit of which fact may, in general, be procured from some of the Clerks in the Foreign Office.

It is said that an affidavit from the plantations cannot be read in this Court, unless under the seal of the island, (*u*) which seal must, also, be verified by the affidavit of some person here who knows the seal to be that of the colony.

Where an affidavit purported to have been sworn before a Magistrate in India, proof was admitted, from the proceedings in the India House, to shew that the person before whom it was sworn was a Magistrate. (*x*)

(*q*) *Vide* Ld. Kinnaird v. Lady Saltoun, 1 Mad. 227.
(*r*) Garvey v. Hibbert, 1 J. & W. 180. (*s*) Hutcheon v. Mannington, *ubi supra*.
(*t*) Garvey v. Hibbert, *ubi supra*. (*u*) Annesley v. Earl of Anglesey, 1 Dick. 90.
(*x*) Hutcheon v. Mannington, 6 Ves. 823.

An affidavit must be correctly intitled in the cause or matter in which it is made; for an affidavit made in one cause, cannot be read, to obtain an order in another; (*y*) it will, however, be sufficient if it was correctly intitled when it was sworn, although the title of the cause may have been subsequently altered by amendment; thus, where, at the time an affidavit was made, there were three defendants in the cause, and the affidavit was intitled in the cause accordingly, and afterwards the plaintiff amended his bill by striking out the name of one of the defendants, and then moved for and obtained an injunction on the affidavit as it was originally intitled, *upon a motion to discharge the order for the injunction, on the ground that the affidavit on which it was obtained was improperly intituled, the Vice Chancellor refused the motion with costs. (*z*)

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In all affidavits the true place of residence, description, and addition of every person swearing the same must be inserted. (*a*) This rule, however, will not apply to affidavits by parties in the cause, who may describe themselves, in the affidavit, as the above named plaintiff, [or defendant,] without specifying any residence or addition or other description: and even where a plaintiff so described himself in an affidavit, and it appeared, upon inspecting the office copy of the bill, that no addition had been given to him in the bill, the affidavit was considered sufficient. (*b*) In that case, also, there were several plaintiffs, and the plaintiff making the affidavit described himself as "the above-named plaintiff," whereas, it was objected, that he ought to have called himself "one of the above plaintiffs," but the objection was over-ruled. (*c*)

An affidavit of several persons, by the manner of wording it, may be made either *joint and several* or *joint or several*, and great care and exactness ought to be observed in drawing them, (*d*)

An affidavit must be true in substance, with all necessary circumstances of time, place, manner, and other material incidents: (*e*) it must also be sufficient to sustain the case made by the motion or petition of which it is the ground work. (*f*)

It is to be observed, particularly, that every affidavit of service of writs, or of orders, upon which process of contempt is to be founded, must truly and fully prove good service; and that if the plaintiff's name, the Court, the return of the writ, or any *thing material, be omitted, no attachment can be thereupon regularly issued; for, until a due service be shewn, no contempt appears to the Court. (*g*)

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An affidavit must also be *pertinent and material*, without needless tautology and impertinent matter or other prolixities. (*h*) Scandalous and irrelevant matter should be carefully avoided, and, if any such are inserted, they may be expunged by the same process as scandal and impertinence in a bill or other pleading. (*i*) It may be here mentioned, that, according to the practice of the Court, as it

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(*y*) Lumbrozo v. White, 1 Dick. 150.
(*z*) Hawes v. Bamford, 9 Sim. 653.
(*a*) Hind. 451; Prac. Reg. 9.
(*b*) Crockett v. Bishton, 2 Mad. 446.
(*c*) Ibid.
(*d*) Harr. ed. Newl. 339.
(*e*) Where the affidavit deposes to words spoken, the addition of "*or to that effect*," is a proper precaution; Ayliffe v. Murray, 2 Atk. 60.
(*f*) Hind. 451. What it will be proper to state in affidavits upon the various applications which may be made to the Court, will, in general, be found on reference to the parts of the present Treatise in which such applications are discussed.
(*g*) Hind. 453.
(*h*) Ibid.
(*i*) For the course of proceeding upon scandal and impertinence in a bill, *vide ante*, vol. 1, p. 456. It is to be observed, that this course of proceeding applies only to scandal or impertinence in affidavits to be used *in Court*; where they are to be used *before a Master* a different course of proceeding to get the scandal or impertinence expunged must be adopted, *vide ante*, vol. 2, p. 851.

existed prior to the New Orders, it was held that a party could not refer an affidavit for impertinence after he had himself filed an affidavit in answer to it; (*k*) and that it was generally considered that if, after an affidavit had been referred for impertinence, the party referring it filed an affidavit in answer, he thereby waived his reference. It seems, however, that since the orders of 1828, (*l*) which require the party to point out specifically, by exceptions in writing, what are the passages he objects to as being impertinent, he will not waive his reference for impertinence by filing an affidavit in answer, unless, by such affidavit, he answers any of those parts of the referred affidavit which are included in the exceptions. (*m*)

It may be mentioned here, that, where a whole petition was recited in an affidavit of service, the costs were ordered out of the solicitor's pocket. (*n*)

Affidavits ought to be fairly written in one hand without blots or interlineations of any words of substance, otherwise the Master may refuse to accept them; or, if he does accept them; *the Registrar of Affidavits*, (*o*) or his deputy, may refuse *to file them. (*p*) Where, however, small [*241] blots or interlineations happen, the *Master* usually marks them, in the margin, with his initials. (*q*)

The time for swearing affidavits, at the public office, is between the hours of ten in the morning, and two in the afternoon, and of six and eight in the afternoon. They may be sworn at a Master's chambers or private house, at any time. If sworn before a Master extraordinary in the country, the Master must, at the foot, express the name of the town and county where it is taken, otherwise it will not be filed. (*r*)

The party swearing the affidavit must subscribe his Christian and surname on the left hand thereof. The *jurat* is written on the right. Any irregularity, in the form of the affidavit or of the *jurat*, will be a ground for the Court refusing to have it read. (*s*)

It is directed, by various orders of the Court, and is the invariable rule of practice, "that all affidavits of this Court, (excepting those only which belong to the *Supplicavit Office*,) shall, before the same be exhibited *in Court*, or otherwise produced to ground any order, writ, process, or proceeding of Court thereupon, be brought into the Office for Registering Affidavits, and be there duly filed and kept; and that neither the Registrar of the Court, his Clerks, or deputies, shall or do, at any time, draw up, sign, or set his or their hand or hands unto any order whatsoever grounded on any affidavit, unless such affidavit be first filed and registered with the Registrar of Affidavits, (*t*) and attestation brought and shewed to the said Registrar of this Court, under the hand of the said *Registrar* of Affidavits, or his deputy attending the said office." (*x*)

This order is now acted upon by the Court in all cases where affidavits are to be used in *Court*, (*y*) in which case *every affidavit must be [*242] filed with the Clerk of Affidavits, who will, upon the affidavit being filed, give an attested copy under his hand and stamp of office, to be read in Court. Sometimes, (when expedition is required,) the solicitor filing the affi-

(*k*) Keeling v. Hoskins, 2 Russ. 319.
(*l*) Ord. 1828. XI. *ante* vol. 1, p. 456.
(*m*) Bickford v. Skewes, 8 Sim. 206.
(*n*) *Ex parte* Smith; 1 Atk. 139.
(*o*) Now the "*Clerk of Affidavits*," Stat. 3 & 4 W. 4, c. 94, s. 11.
(*p*) Hind. 451.
(*q*) Ibid. *et vide* Beames's Ord. 148.
(*r*) Ib. 452.
(*s*) Ibid. As to the form of the *jurat*, *vide ante*, vol. 2, p. 279.
(*t*) Now the Clerk of Affidavits.
(*x*) Beames's Ord. 148.
(*y*) Hind. 452; Prac. Reg. 8; Curs. Can. 419; Harr. (Ed. Newland,) 400. The order will not apply to affidavits that accompany bills which must be filed with the bill, and constitute part of the record. *Vide* vol. 1, p. 503.

davit, instead of waiting for an office copy by the Clerk of Affidavits, takes a copy of the affidavit to the office at the same time that he takes the original affidavit to be filed, and then the Clerk of Affidavits marks the copy as an office copy at the same time that he files the original. (*z*)

It is to be observed, that it is only where affidavits are to be made use of *in Court* that they are required to be filed; where they are to be used *before a Master*, they are not filed in the Affidavit Office, but are left in the Master's Office, from which, if they are afterwards required in Court, they must be brought by the Master's Clerk, in whose custody they are.

By Lord Lyndhurst's Orders, (*a*) all affidavits which have been previously made and read in Court, upon any proceeding in a cause or matter, may be used before the Master. The converse of this rule, however, has not been adopted, and affidavits left with the Master can only be read in Court upon exceptions or appeals from the Master's determination, and not to found any new order or process of the Court. (*b*)

There is no particular time appointed for filing affidavits before applications are made to the Court, but all affidavits made to ground a motion, must be filed time enough, before such motion is made, to enable the adverse party to take a copy of it, if not the motion or petition which the affidavit is to support, must stand over: (*c*) this, however, will not apply to affidavits which cannot, according to the practice of the Court, be answered as in the case of an affidavit to extend an injunction to stay trial. (*d*)

[*243] *It is to be observed, that an affidavit, filed on the day of the date of a notice of motion, may be read upon the motion, although the notice was not served till some days after its date—*a party on whom a notice of motion is served being bound to search for affidavits as far back as the date of the notice of motion.* (*e*)

A party, however, is not bound to search for affidavits further back than the date of the notice; if, therefore, an affidavit made in the cause and filed on a former occasion, is intended to be used upon the motion, notice of such intention should be given either in the original notice of motion, or by separate notice in writing, duly served.

It is laid down, that where the Court directs that affidavits shall be filed on both sides, by a certain day, and some of the affidavits on one side happen not to be filed on that day, it is the established rule of the Court not to enlarge the order further, in order that the other side may be enabled to give an answer to those affidavits. (*f*)

(*z*) Hind. 452.

(*a*) Ord. 1828, LXV.

(*b*) The order as to filing affidavits with the Clerk of Affidavits, applies only to affidavits to be used in matters arising out of suits or summary applications to the Court as a Court of Equity; all affidavits belonging to the *Supplicavit* Office and the Petty Bag Office, and also those touching lunatics and bankrupts, are to be filed in the several offices where such matters are transacted. Hind. 452.

(*c*) Hind. 252. As to the time for filing affidavits, upon which to ground an attachment for non-appearance, *vide ante*, vol. 1, p. 579.

(*d*) Jones v. ———, 8 Ves. 46.

(*e*) Bowdler v. Bowdler, 4 Law Journ. N. S. Chancery, 344.

(*f*) Burton v. Maloon, Barnard, 401; but the affidavits so filed can not be read.

*CHAPTER XXXI. [*244]

OF INTERLOCUTORY APPLICATIONS.

SECT. 1—*General nature of.*

AN *interlocutory* application is a request made to the Court, either orally or in writing, for its interference in a matter arising in the progress of the cause, whether before it has been brought to a hearing, or afterwards, in consequence of the decree or order made upon such hearing; and it may either relate to the process of the Court, or to the protection of the property in litigation *pendente lite*, or to any matter upon which the interference of the Court is required before or in consequence of a decree or decretal order.

Interlocutory applications are extremely various, and the occasions upon which they may be made are too numerous to be discussed in a general treatise of this nature; all, therefore, that can, now, be done is, to direct the reader's attention to some of the most important and frequent occasions upon which such interlocutory applications may be made, and to point out the course of practice upon each. This will be the object of some of the succeeding chapters of this work; but before he proceeds to the accomplishment of it, the Author conceives that it will be useful, to the practitioner, to lay before him some of the general rules by which such applications are governed.

Applications of this nature, when made *vivâ voce* to the Court, are called *motions;* when they are made in writing, they are called *petitions;* there does not, however, appear to be any very distinct line of demarcation between the cases in which they should be made by motion, and those in which they should *be made by petition, the practice in this respect being [*245] generally regulated by the circumstances of each case. (*a*)

The orders of the Court have, however, pointed out certain matters which shall not be granted upon petition, and the general practice with regard to others has concurred, in some cases, in limiting the application to that method: thus—"It is ordered that no injunction for stay of suit at law shall be granted, revived, *dissolved*, or stayed upon petition; (*b*) nor any injunction, of any other nature, shall pass by order upon petition, without notice, and a copy of the petition first given to the other side, and the petition filed with the Registrar, and the order entered; and that no *sequestration*, *dismission*, *retainer upon dismission*, *or final orders*, are to be granted upon petition." (*c*) So also, although it is competent to the Court to order money in Court to be paid out, upon motion, Lord Eldon, it is said, would not allow it to be done, as the general recitals in a petition, which must be justified by the proceedings to warrant the drawing up of the order, would always speak for themselves, at any distance

(*a*) This applies only to applications *in a cause*, where the application is made on behalf of infants, or under the statutory jurisdiction it must be by petition, unless otherwise directed by the statute under which the application is made.

(*b*) Beames's Ord. 12, 35, 214; an order *nisi*, for dissolving the common injunction may now, however, be obtained upon petition, as well as by motion. Ord. 1828, XXIII. And when an application is made to one of the Judges for a special injunction upon certificate of bill filed, when the Court is not sitting, it may be made by petition. *Vide post*, Chap. XXXII, Sect. 3.

(*c*) Beames's Ord. 214.

of time; in conformity with this, the practice, except in particular cases, is, not to make such order unless upon petition. (*c*) In like manner, all applications for orders, which partake more of the nature of decrees or of decretal orders than of interlocutory proceedings, such for instance as applications for the appointment of guardians, and for the allowance of maintenance, for infants, should be made, by petition; and so, in general, must all applications to the Court, upon matters arising out of decrees or decretal orders, except those relating to the process of the Court or for enforcing the performance of them, which are usually made upon motion.

[*246] *In *Lord Shipbrooke* v. *Lord Hinchinbrooke*, (*d*) Lord Erskine, C., says—"I do not find that there are any precise or positive boundaries between motions and petitions, as they are to be applied to carry into effect decrees and orders, so as to exclude all discretion in the Court to grant or refuse them, according to circumstances: but, generally speaking, motions, which have for their object the giving effect to decrees or orders, should be confined to cases where the order which is to be made upon the motion, arises out of recent proceedings upon which there is no doubt; for as the adverse party knows nothing but by the notice, containing only the name of the cause and what is prayed of the Court, the proceedings ought to be recent and notorious, so as that the adverse party may be supposed to be perfectly conusant of all the steps and proceedings in the cause, as much as if, at a greater expense, they were recited in the petition."

By the orders of the 5th May, 1837, (*e*) it is directed, that all interlocutory applications by way of motion or petition, (other than applications for orders of course,) shall, in the several cases after mentioned, be made to the Lord Chancellor, or to the Vice Chancellor, and shall not, without special order of the Lord Chancellor, be made to the Master of the Rolls; viz: in the several cases following:—1st, where the original information or bill is marked with the words "*Lord Chancellor;*" 2nd, where the cause has not been set down for hearing, and any order disposing of any plea or demurrer *or any special order upon merits, shown by answer or by affidavit*, has been made in the cause by the Lord Chancellor or Vice Chancellor, *and no such order has been made by the Master of the Rolls;* 3rd, where the cause has not been set down for hearing, and orders disposing of pleas or demurrers, or special orders upon merits, shown by answer or affidavit, have been made by *both* the Lord Chancellor or Vice Chancellor and the Master of the Rolls; but the *last* of such orders was made by the Lord Chancellor or Vice Chancellor; 4th, where the cause has been set down for hearing before the Lord Chancellor, either for

[*247] original hearing or for further directions, or on the equity reserved; *5th, where the decree or last decretal order was made by the Lord Chancellor or Vice Chancellor, except in cases where the decree or last decretal order was made by the Lord Chancellor on a rehearing of a decree or decretal order, made by the Master of the Rolls.

The 12th of the same set of orders (*ee*) provides that all interlocutory applications, by way of motion or petition, (other than applications for orders of course,) shall, in the several cases after mentioned, be made to the Master of the Rolls, and shall not, except for the purpose of rehearing an order of the Master of the Rolls, be made to the Lord Chancellor, viz: in the several cases following:—1st, where the original information or bill is marked with the words "Master of the Rolls;" 2nd, where the cause has not been set down for hear-

(*c*) *Vide* Lord Shipbrooke v. Lord Hinchinbrooke, 13 Ves. 394.
(*d*) 13 Ves. 393. (*e*) Ord. IX.
(*ee*) Ord. 5th May, 1837.

ing, and any order disposing of any plea or demurrer *or any special order upon merits shown by answer or affidavit* has been made in the cause by the Master of the Rolls, *and no such order has been made by the Lord Chancellor* or *Vice Chancellor;* 3rd, where the cause has not been set down for hearing, and orders disposing of pleas or demurrers, *or special order upon merits, shown by answer or affidavit,* have been made *by both* the Lord Chancellor or Vice Chancellor and the Master of the Rolls, but the *last* of such orders has been made by the Master of the Rolls; 4th, where the cause has been set down for hearing before the Master of the Rolls, either for original hearing or for further directions, or on the equity reserved, and is not now set down to be so heard before the Lord Chancellor; 5th, where the *decree or* last *decretal order* was made by the Master of the Rolls or by the Lord Chancellor, on the rehearing of a decree or decretal order of the Master of the Rolls.

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*SECTION II. [*248]

By Motion.

A motion is an application made to the Court, *ore tenus*, either by a party to the suit or his counsel.

A motion may be made by or on behalf of any of the parties to the record, provided such party is not in contempt; (*f*) but an individual who is not a party to the record, cannot, in general, be heard to make an application by motion: thus it has been held, that when a receiver has occasion to apply to the Court, he must do so by petition. A person, however, who is *quasi* a party to the record, such as a creditor coming in under a decree, or a purchaser of an estate sold by order of the Court, may apply to the Court by motion: thus, as we have seen, a purchaser may move to confirm the Master's report of his being purchaser, (*g*) and a creditor or legatee may apply, by motion, for leave to except to the Master's report. (*h*)

A motion is either *of course*, that is, for an order which, by some standing rule or known practice of the Court, may be granted without hearing both sides: or, 2dly, special, *i. e.* for an order which is not a mere matter of course and can only be granted under special circumstances, or upon notice duly served upon the opposite party.

A motion is of course, *where, by the rules of the Court, the object of it is granted upon asking for it;* (*i*) no notice is necessary of such application, as no opposition will be allowed to it, (*k*) but if it is obtained upon a false suggestion, it may be set aside upon application by *special* motion. (*l*) It is to

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(*f*) As to the effect of contempt, in precluding a party from making an application to the Court, *vide ante*, vol. 1, p. 655. It is to be observed that an attachment issued against a party after he has served a notice of motion, but before the motion made, will not prevent his making it, Jeyes v. Foreman, 6 Sim. 384.

(*g*) *Ante*, vol. 2, 909. (*h*) Ibid. 947.

(*i*) 1 Newl. 143.

(*k*) Ibid. and *vide* Eyles v. Ward. Mos. 255.

(*l*) *Vide post*, p. 252.

[*249] *be observed that most orders which can be obtained by motion of course, may also be obtained by petition of course addressed to the Master of the Rolls. (*m*)

The orders which were formerly obtained by motion or petition of course, were very numerous, but in consequence of the alterations which have recently been made in the practice of the Court, their number has been much reduced: thus, under the old practice of the Court, orders for further time to plead or answer a bill were granted upon motion or petition of course, but now, as we have seen, all such applications are special, and must, under the Stat. 3 & 4 Wm. 4, c. 94, be made to one of the Masters in ordinary, in the manner pointed out by that statute. (*n*)

So also, orders for leave to amend a bill, might be obtained at any time before publication, by motion or petition of course, but now the plaintiff is only entitled, as of course, to one order for leave to amend (except for the purpose of correcting clerical errors or adding parties;) after a full answer has been put in by the defendant, all other applications for leave to amend must be made to a Master, or to the Court, upon notice. (*o*)

Applications to enlarge publication, where the cause was not set down, were also, under the old practice, made by motion or petition of course; but, under the 3 & 4 Wm. 4, c. 94, s. 13, all applications to enlarge publication must be made to a Master. (*p*)

Under the old practice also, orders to dismiss bills for want of prosecution before replication, were made upon motions of course, but, under the New Orders, (*q*) such applications have been rendered special and must be made by motion of which notice has been given. (*r*)

Motions of course may be made any day in term, but out of term they cannot, in general, be made, except on a seal day. In reckoning the days of term, the day succeeding the last day of term may be included, as a day on which motions that are not moved on the last day of term, may be made at the

[*250] *Rolls, that day being in fact a continuation of the last day of term. (*s*)

Out of term, motions of course can only be made on one of the days appointed for general seals, except the seal is adjourned, in which case a motion may be made on any of the adjournment days, *provided the party making it was entitled to make it on the day when the seal commenced.* (*t*) The rule, that a party making a motion of course after the first day of a seal, must have been in a situation to make it on the first day, has been very frequently enforced; and where it has not been attended to, the order obtained has been discharged for irregularity. In *Sharp* v. *Ashton*, (*u*) Lord Eldon laid it down, that, strictly, no motion could be made at a seal, the brief of which was not put into counsel's hands at least on the first day of the seal; and the practice, as above laid down, continued to be adhered to in all cases, until the promulgation of

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(*m*) *Vide post*, Sect. 3.
(*n*) *Ante*, vol. 2, p. 274.
(*o*) *Ante*, vol. 1, p. 543.
(*p*) *Ante*, vol. 2, 568.
(*q*) Ord. 1828, XVI. and 1831.
(*r*) *Ante*, vol. 2, 356.
(*s*) Formerly, when the Lord Chancellor could not get through the motions on the last day of term, he appointed the Master of the Rolls to sit for him, on the following day, to complete the motions; from whence the practice originated of making motions which could not be made in Court on the last day of term, before the Master of the Rolls, at his house, on the day after, before the ordinary business of the Master of the Rolls' sittings commenced. This practice has now, in consequence of the appointment of a Vice Chancellor, become nearly obsolete.
(*t*) Sharp v. Ashton, 2 V. & B. 412.
(*u*) Ibid.; Rowe v. Jarrold, 5 Mad. 45; Saxby v. Saxby, 7 Sim. 140, *ubi supra*.

Lord Brougham's Orders. (*x*) By the tenth of those orders, it is provided that, in every cause for an injunction to stay proceeding at law, if the defendant do not plead, answer, or demur to the plaintiff's bill within *eight* days after appearance, the plaintiff shall be entitled as of course, upon motion, to such injunction; and the Courts, upon the construction of this order, have held, that where the eight days allowed to the defendant to plead, answer, or demur, expire out of term, the plaintiff will be entitled to his injunction on any day on which motions can be made, without being obliged to wait for the next seal. (*y*)

This construction, however, only applies to cases under the tenth order, above referred to; in all other cases, a party *cannot make a motion of course at an adjourned seal day, unless he was in a situation to make it when the seal commenced. [*251]

By the order of the 5th of May, 1837, (*z*) which was made for the purpose of regulating the practice with regard to the branch of the Court before which causes or motions, or other applications, should be brought on, it is provided that "all applications for orders of course, to be obtained on petition or motion, shall and may be made in the same manner, in all respects, as if the above orders had not been made; but as to all cases in which, according to the 9th preceding order, interlocutory applications, (other than applications for orders of course,) are directed to be made before the Lord Chancellor, or Vice Chancellor, if any order *nisi* upon which cause against making the order absolute is to be shewn to the Court, shall be obtained as of course from the Master of the Rolls, such cause shall be shewn before the Lord Chancellor or Vice Chancellor; and if any order of reference to the Master in ordinary shall be obtained as of course from the Master of the Rolls, and the Master's report, pursuant to such order of reference, shall be excepted to, the exceptions thereto shall be heard before the Lord Chancellor or the Vice Chancellor; and in all cases in which, according to the 12th preceding order, interlocutory applications (other than applications for orders of course,) are directed to be made before the Master of the Rolls, if any order *nisi*, upon which cause against making the order absolute is to be shown to the Court shall be obtained as of course from the Lord Chancellor or Vice Chancellor, such cause shall be shewn before the Master of the Rolls; and if any order of reference to the Master in ordinary shall be obtained as of course, from the Lord Chancellor or Vice Chancellor, and the Master's report pursuant to such order of reference shall be excepted to, the exceptions thereto shall be heard before the Master of the Rolls."

Formerly, all motions *of course*, as well as *special*, were mentioned to the Court by the counsel who moved them, but, owing to the pressure of business upon motion days, it is now the general practice for the counsel to sign the brief or motion *paper, adding the date to the signatures, and to hand them to the Registrar in Court, who enters them in his book, and then returns the brief or motion paper to the counsel. [*252]

A special motion is one which it is not a matter of course to grant, but some ground must be laid for it—either a previous order, or by the pleadings in the cause, or by affidavit of the party on whose behalf it is made, or of some other person conusant of the facts upon which the application is founded.

(*x*) Ord. 1833, X.

(*y*) Brierley v. Walmsley, 1 Keen, 141; Edwards v. Burgess, cited ib. 142; the same principle will apply to orders to revive under the 10th order.

(*z*) Ord. XIV.

Motions of this description may be made either, 1st, *ex parte;* or, 2nd, upon affidavit of service of a preceding order *nisi;* or, 3rd, upon notice.

1. When they are made *ex parte*, as in the case of motions for a *ne exeat regno*, or for an injunction to stay waste, &c., they must be supported by the affidavit of the party applying for them, and by such collateral affidavits as may be necessary to make out a sufficient case for the interference of the Court.

The object of motions of this nature is generally to prevent the performance of some act which, if performed, might be productive of irreparable injury; and it is therefore desirable, that the party affected by it should not have any previous intimation of the intention to apply to the Court to restrain him,—where there is no danger that the object of the motion would not be defeated if notice were given, they will not be permitted.

Ex parte motions are not limited to the ordinary motion days, but may be made to the Court at any time during its sittings; or, if the Court be not sitting, they may be made to one of the Judges, at his private house. In such cases, however, care must be taken to make the motion before the Judge who, under the orders of 5th May, 1837, has properly the cognizance of the cause, unless it be made during the vacation which intervenes between the close of the sittings after any term, and the commencement of the sittings before or at the beginning of any term, when, according to the orders of the 5th of May, 1837, (*a*) applications for special orders may be made to any Judge of the Court. In those [*253] cases, however, the orders *made by the Lord Chancellor, or by the Master of the Rolls, or by the Vice Chancellor, if not made by the Judge to whom the application, if made during the ordinary sittings of the Court, would have been made, are to be marked as having been made for such Judge, and in the future proceedings of the cause are to be deemed to be the order of such Judge, save this—"that no order so made by one Judge for another, under such circumstances, shall be reheard for the purposes of being discharged or varied otherwise than by the Lord Chancellor. (*b*)

It is to be recollected, that, by the same orders, (*c*) where an order *nisi* has been obtained, either by motion of course, or by petition to the Master of the Rolls, cause must be shewn against making such order absolute, before the Judge, who, by the operation of the 9th and 12th orders, is the Judge before whom interlocutory applications in the cause ought to be made, (*d*) and that, consequently, the motion to make such order absolute, must be made before the same Judge.

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2. Where an order is made by which a particular act is to be done, unless the other party shall within a certain time shew cause to the contrary, (which order is generally termed an order *nisi*,) the party obtaining the order must, after the expiration of the time limited by the order *nisi*, if no cause is shewn, move for another order to confirm the previous order *nisi* absolute. The motion in this case, requires no notice, but the application must be supported by an affidavit to prove the due service of the order *nisi*, either upon the party himself, when such service is required to be personal, or upon his Clerk in Court, where personal service is not required or has been dispensed with, and service upon the Clerk in Court directed by special order.

[*254] *3. When the application to be made to the Court is not of course, or is not founded upon the service of a previous order *nisi*,

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(*a*) Ord. XV.
(*b*) Ord. XV.
(*c*) Ord. XIV.
(*d*) *Vide ante*, p. 246.

or does not come within that class of applications which the Court permits to be made *ex parte;* the general practice requires that a statement in writing of the terms of the motion should be served upon the adverse party or his Clerk in Court, a certain number of days before the day on which the motion is intended to be made. This statement, in writing, is termed a *notice of motion.*

Motions of course, or special motions which are not likely to occupy much time, may be made on any day in term, at the rising of the Court after the causes are heard; but the Court generally appoints one day in every week, during term, for the hearing of motions in general; this day is usually Thursday, except it happens to be the second day in term, or the last day, save one, of the end of the term; in which case, as the first and last days of term are always devoted to motions only, no other motion day is appointed in the weeks in which those days occur. (*e*)

In the vacation, the only regular motion days are—the seal days, (*f*) which are appointed after every term, and no motion can be made after the termination of the last seal after term, till the first day of the next term, or the first general seal before it, unless upon special leave of the Court first obtained authorizing the party to give notice of the intended motion; when, also, a special motion is required to be made during the sittings of the Courts after term, at one of the intervals between the seals, or when during term a motion of importance is required to be made on any day, not being the first or last day of term, or one of the days usually appropriated to motions, special leave must be obtained to give notice of the motion for that day, and the fact of such special leave having been obtained, must be stated in the notice of motion.

**A notice of motion* must be properly intitled in the cause in which the application is to be made: it must be addressed to the Clerk in Court of the party or parties intended to be affected by it, or to the party himself where personal service is intended; and it must bear the signature of the Clerk in Court, or of the solicitor, or firm of the solicitor of the party moving. A notice of motion by a party suing or defending in *formâ pauperis*, must be signed by the Clerk in Court of such pauper, and not by the solicitor. (*ff*) [*255]

It must state the day on which the motion is to be made, which, if in term, may, as we have seen, be on any day in term; although, unless the application is a mere matter of course, or is to be consented to, it cannot be made till one of the days appointed for motions; out of term, it must be a general seal day, unless special leave has been obtained to give the notice of motion for another day. The notice, however, though it generally expresses the day when the motion is to be made, usually adds "*or as soon after as counsel can be heard.*"

It is to be observed, that whenever a motion is to be made "*by leave of the Court,*" the notice ought to mention that it is so made, otherwise the party against whom it is to be made may disregard it. (*g*)

A notice of motion must state clearly the terms of the order asked for; and here it may be noticed that the Court will not, upon motion, make an order which will decide the principal point of the case, unless upon the consent of all the parties affected by it, which consent must be expressed by their counsel

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(*e*) Harr. Ed. Newl. 466.

(*f*) On the morning after term, motions, which could not be made before the Lord Chancellor on the last day of term, and formerly used to be made before the Master of the Rolls, but since the appointment of the Vice Chancellor and the orders of the 5th of May, 1837, the practice has become obsolete, except in the instance of motions of course, *ante*, p. 249, n.

(*ff*) Gardiner v. ——, 17 Ves. 387; *ante*, vol. 1, p. 45.

(*g*) Hill v. Rimell, 8 Sim. 632.

in Court, and cannot be inferred from their not attending in pursuance of the notice of motion. (*h*)

The Court will not, ordinarily, extend the order made, upon a motion, beyond what is expressed in the notice,—as where the notice was, that the Court would be moved that the plaintiff might be put into possession, and a receiver appointed, the Court, though the defendant did not oppose the motion, would not direct that nothing should be received by the defendant in *the meantime; (*i*) it is therefore necessary, that every thing the party wishes to be obtained upon his motion, should be expressed in the notice, otherwise the Court will not grant it.

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Thus, costs are never given to the party moving, unless asked for by the notice of motion, and where a motion was made to take a demurrer and answer off the file for irregularity, Lord Eldon held, that costs ought not to be given, as they were not mentioned in the notice of motion. (*k*)

It is to be observed, that several objects may be included in the same notice of motion; such as the appointment of a receiver, and an injunction and the payment of money into Court; (*l*) or the appointment of a receiver, and payment of money into Court, and the production of papers. (*ll*)

The notice of motion must also mention the Judge before which it is to be made, but it is to be observed, that if a notice is given for a motion before the Lord Chancellor, his Lordship will, unless it is an appeal motion, or unless the party has previously applied for and obtained his Lordship's permission to have it made before him, direct it to be made before the Vice Chancellor.

When a motion is to be made before the Lord Chancellor, it will be sufficient to state in the notice—"*That this honorable Court will be moved, &c.*" (*m*)

By an order of the 13th of Dec. 1814, (*n*) every notice of motion intended to be made before his Honor the Vice Chancellor, upon any matters relative to which his Honor the Vice Chancellor is authorized to make any order or orders, shall in future express that the same is intended to be made before his Honor the Vice Chancellor; but this is to be without prejudice to any motion being made before his Honor the Vice Chancellor relative to any such matters as aforesaid, the notice of which shall not have expressed such intention, if the parties shall consent that such motion shall be so made; and this is *also to be without prejudice to any motions being made before his Honor the Vice Chancellor, which the Lord Chancellor shall direct to be so made, and also to be without prejudice to the Lord Chancellor's making any orders upon motions which the Lord Chancellor may think fit to permit to be made before him, although the notice of motion shall have expressed that it was intended to be made before his Honor the Vice Chancellor.

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If it is intended, upon making the motion, to read any affidavits which have been already filed in the cause, such intention ought, in strictness, to be mentioned in the notice of motion, otherwise the respondent would not have any intimation that such affidavits were to be read, the rules of the Court not requiring him to search for affidavits further back than the date of the notice of motion. But though, in strictness, the affidavits ought to be mentioned in the notice of motion, a separate notice of the intention of the mover to read them, duly served, will be sufficient.

(*h*) Like v. Berresford, 3 Bro. C. C. 366. (*i*) Prac. Reg. 287.

(*k*) Mann v. King, 18 Ves. 297. Where costs are asked for by the notice, the motion is made at the peril of paying costs if unsuccessful, ibid.

(*l*) Lumsden v. Fraser, MSS. V. C. Nov. 1837.

(*ll*) Brown v. Keating, MSS. Rolls, July, 1840.

(*m*) 1 Smith. 64.

(*n*) Beames's Ord. 484; 2 V. & B. 418.

All notices of motion for any process of contempt or commitment, must be served *personally* upon the party to be affected by it, unless an order has been previously obtained for substituted service.

It is said, that notice of motion to receive money out of Court, must be served personally upon the adverse party, unless the Court, upon a former motion, has ordered so many days' notice to the Clerk in Court, as may be sufficient to send his client notice, and to have his answer; or if he be in the kingdom but hard to be found, upon affidavit thereof, such notice may be ordered to be served upon his Clerk in Court. (*o*)

If personal service upon the party is not necessary, a notice of motion may be served upon his Clerk in Court, or on his clerk or agent at his seat; (*p*) but whenever a person *who is not a party* appears in any proceeding, either before the Court or before the Master, service upon the solicitor in London by whom such party appears, whether such solicitor *acts as principal or [*258] agent, shall be deemed good service, except in matters of contempt requiring personal service. (*q*)

Every notice of motion, as well as every petition which requires notice, must be served at least *two clear days* before the hearing of such motion or petition. (*r*) Sunday is not reckoned a day in such cases. (*s*)

Service of a notice of motion is effected by delivering a true copy of the notice to the individual on whom the service is made, who, if the service be not personal upon the party, is the Clerk in Court of the party, or his clerk or agent at his seat at the Six Clerks' Office.

The individual who serves the notice, should, after serving it, make an affidavit of the service, to be used in case the party served should not appear when the motion is made. And it is to be observed that, in an affidavit of this nature, it is not enough to say that notice was given, or the copy delivered to the party's Clerk in Court, but his name must also be expressly mentioned, that it may appear, with certainty, to whom notice was given, and it must say—"*Notice in writing*," or words to that effect. (*t*) So if he who serves the notice does not know the person on whom it is served to be the party's Clerk in Court, he must say—"*As he is credibly informed and verily believes*," (*u*) first taking care that he receives information accordingly; but, if a notice be left at the Clerk in Court's seat, with his agent or clerk, such agent or clerk need not be named. (*x*)

The affidavit of service ought, in strictness, to be made and filed before the motion is made; it may, however, be filed afterwards, but no order will be drawn up on affidavit of service of motion or petition, unless it be made and *filed*, at the latest, *before the rising of the Court on the day on which the application is made.* (*y*)

Where a motion is intended to be made, upon notice, against *a [*259] defendant who has not appeared, leave to serve such notice upon him personally, must be first obtained from the Court, and mentioned in the notice of motion, (*z*) otherwise the motion cannot be granted. (*a*)

(*o*) Harr. Ed. Newl. 465. (*p*) Ibid.

(*q*) Ord. 1828, XLIV. The respondents in a charity petition, are parties to it, and, therefore, not within this order. *In re* Willoughby's Charity, 6 Sim. 18; *et vide ante*, vol. 2, p. 804.

(*r*) Ord. 1828, XXII.

(*s*) Harr. Ed. New. 465; Maxwell v. Phillips, 6 Ves. 146.

(*t*) Hind. 452. (*u*) Ibid.

(*x*) Prac. Reg. 9; *sed vide*, M'Cauley v. Collier, 1 Ves. J. 141.

(*y*) Lord Milltown v. Stuart, 8 Sim. 34. (*z*) *Ante*, p. 255.

(*a*) Hill v. Rimell, 2 M. & C. 641; *ante*, vol. 2, p. 17 n.

According to the general rule of the Court, upon motion or seal days, the Judge calls upon each counsel in Court, in turn, according to their seniority, to move, (*b*) and each counsel when called upon, has a right to make two motions before the next counsel is called upon. If, upon going through the bar, all the motions are not exhausted, the same process is gone through, *toties quoties*, till all the motions are disposed of. (*c*)

It has been before stated, that a counsel moving on behalf of a party admitted *formâ pauperis*, is bound to make his motion before any other he may have, but that he may afterwards make as many motions as he might have had if he had not made it. (*d*)

If a counsel is unable to make a motion, of which notice is given on the day named, "or as soon after as counsel can be heard," he may save his notice of motion till the next seal or motion day; but if he omits either to make the motion or to save it, the opposite party may, at the termination of the seal or at the next seal, apply for his costs of the motion. (*e*)

A motion is made by the counsel to whom it is entrusted, who in making it [*260] reads the notice of motion, and the affidavits *filed on behalf of the party for whom the motion is made. It is to be observed, however, that he cannot read any affidavits filed before the date of his notice of motion, unless notice of his intention to read them, has been duly served on the opposite party; (*ee*) nor can he read any affidavit which has not been filed sufficiently long before the motion is made to enable the other side to take a copy of it. And here it may be remarked, that it is the duty of the solicitor for the party against whom a motion is to be made, to search the Affidavit Office up to the morning of the day on which the motion is to be made, to ascertain whether any affidavits have been filed: he need not, however, carry this search back beyond the day of the date of the notice. (*f*) The same thing must be done by the solicitor for the party making the motion, in order to ascertain whether affidavits have been filed on the other side. If the motion is not made on the day named in the notice, a party filing a further affidavit ought to give notice of his having done so to the opposite party, or else he should furnish him with a copy of the affidavit so filed.

These rules are sanctioned by the opinion of the Vice Chancellor, in *Clement* v. *Griffith*, (*g*) who said that, according to strict practice, such affidavits only can be read, as are filed between the service of the notice of motion and the day on which, according to such notice, the motion is to be made; that the adverse party is not bound to extend his search for affidavits to a period either prior or subsequent; and that, consequently, if it is desired to read affidavits

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(*b*) This order is reversed on the last day of term, when the junior counsel is first called upon, and so on up to the senior.

(*c*) Formerly, the practice was otherwise, and each counsel had a right to make all the motions entrusted to him, for the seal or motion day, before the next was called upon; the consequence of this was that, from the accumulation of motions in the hands of some of the leading counsel, the motions in their hands for one seal or motion day, were seldom exhausted before another motion day arrived, when they claimed and exercised the right of adding the new motions, for that day, to those remaining in their hands from the last motion day, and of making them all before the next counsel was called upon, and so on through every motion day; the effect of which was, that it seldom, if ever, came to the turn of a *junior* counsel to make any motion. To remedy the inconvenience occasioned by this course of proceeding, the present system was adopted by the Judges.

(*d*) *Ante*, vol. 1, p. 45; *vide* ib. p. 46, where a penalty is inflicted on counsel making a motion on behalf of a party *formâ pauperis*, where he has not been admitted as such.

(*e*) *Vide post*, 263. (*ee*) *Ante*, p. 257.

(*f*) Ibid.

(*g*) C. P. Cooper's Rep. 470; so also, Bent v. Reynolds, M. R. June, 1838, ibid.

filed at any other time, notice of the filing of such affidavits and of the intention to read them, should be given.

If an affidavit which has been filed upon or in answer to a motion, requires an answer, but it has been filed so recently that an affidavit in answer can not be procured, the party affected by it should, if he be the party moving, save his notice of motion till a future day; or, if he be the respondent, he should ask that the motion should stand over, in order that he may file another affidavit. It is to be remarked, however, that it *will be no objection to a [*261] motion being made, that an affidavit was filed only the day before, if it is an affidavit that cannot be answered; and, therefore, where a motion was made to extend an injunction to stay trial, and it was objected to on the ground that the affidavit "that the plaintiff could not go to trial with safety till the answer came in," was not filed till the day before, Lord Eldon held that the affidavit was one which could not be answered, and that the motion was regular. (*h*)

In a late case, (*i*) the Vice Chancellor, Sir L. Shadwell, said that where a plaintiff had obtained an injunction *ex parte*, upon certificate of bill filed and affidavits, and then the defendant made an application, upon counter affidavits, to dissolve such injunction, it was his uniform habit to entertain such application immediately, and not to give the plaintiff any time for replying to such affidavits,—his Honor observed that it was true that, in some cases, justice might require that the plaintiff should have an opportunity of filing affidavits in reply; but whether that was so or not, in each particular case, it was his practice to determine for himself after hearing the matter, and that he afforded or refused such opportunity according to circumstances. In another case, (*k*) his Honor is reported to have said, that where notice was given of a motion to dissolve an *ex parte* injunction, and on the motion being mentioned it was ordered to stand over, at the plaintiff's request, he would not allow any affidavits to be read at the hearing of the motion, unless they were filed before 10 o'clock of the day for which the notice was given. His Honor added, that he had informed the Lord Chancellor that such was the course which he meant, in future, to take, and that his Lordship approved of it as a general rule. (*l*)

When the counsel who makes the motion has concluded, he is followed by his junior, if he has one, after which the counsel in opposition to the motion are heard. The counsel for the party moving has then the right of reply, after which the Court pronounces its decision.

*It is to be observed that the party commencing, upon an appli- [*262] cation of this nature, has always the right of reply, except in injunction cases, where, upon an order to dissolve an injunction, *nisi*, the plaintiff shows cause upon the merits confessed in the answer; then no reply is allowed, the motion for the order *nisi* being considered as the application, to which the plaintiff answers by showing cause upon the merits; after this the defendant's counsel is allowed to argue against the cause shown by the plaintiff, and this is considered as the reply.

In deciding upon a motion, the Court sometimes extends its order to the costs of it; that is, if it dismisses it, it frequently dismisses it with costs, though, as we have already seen, it cannot grant it with costs, unless the costs have been specifically mentioned in the notice of motion. (*ll*)

(*h*) Jones v. ———, 8 Ves. 46.
(*i*) Anon. July, 1839; C. P. Coop. Rep. 471 n.
(*k*) Anon. 10 Sim. 50.
(*l*) For further information, as to the practice of reading affidavits in injunction cases, *vide post*, Chap. "*Injunction*."
(*ll*) *Ante*, p. 256.

When no order is made respecting the costs of a motion, they become subject to the rules already pointed out with reference to "*costs in the cause.*" (*m*)

If a party who is not interested in the result of a motion is served with the notice of motion, he will be entitled to the costs of appearing. (*n*)

It may be mentioned in this place, that, in some cases, where a party succeeds in his motion, he will be ordered to pay the costs of it; thus where he applies for an order which is for his own benefit, he will, in general, be ordered to pay all the other parties their costs occasioned by the application; upon this ground, where a plaintiff, in a foreclosure suit, applied, that the cause might be advanced for hearing, which was opposed by the defendant, under the orders of the 9th May, 1839, (*o*) the Vice Chancellor ordered the cause to be advanced and the plaintiff to pay the costs of the motion. (*p*)

[*263] Formerly, if a party gave notice of a motion which he afterwards *abandoned, he was not liable to pay to the other party his costs of appearing to oppose the motion, until a notice of the same motion had been given three times, without its being made, and then, upon a fourth notice, the opposite party might object to such motion being heard, until the costs of the three former motions were paid; (*pp*) but, by an order of Lord Eldon, dated the 5th August, 1818, (*q*) it is ordered, "that if a party gives notice of motion and does not move accordingly, he shall, *when no affidavit is filed*, pay to the other side forty shillings costs, upon production of the notice of motion; but that *when an affidavit is filed*, by either party, the party giving such notice of motion and not moving, shall pay to the other side costs, to be taxed by the Master, unless the Court shall direct, upon production of the notice of motion, what sum shall be paid for costs."

Under this order, if a motion is not made according to the notice, the respondent must apply to the Court for his costs, according to the terms of it; and the costs cannot be granted unless the notice is mentioned to the Court; nor will the order for costs be drawn up, unless the notice is produced to the Registrar. (*r*)

It is to be observed, that an order for the costs of an abandoned motion will not be made after the bill has been dismissed for want of prosecution; (*s*) and that where a plaintiff gave a notice of motion and died before it was made, and before his executors revived the suit, the Vice Chancellor refused to give the defendants their costs as of an abandoned motion. (*t*) The same suit was afterwards revived by the executors of the deceased plaintiff, and, upon the hearing, the bill was dismissed with costs; in taxing the costs, the Master disallowed the defendants their costs of the abandoned motion, whereupon they presented a petition praying liberty to except to the Master's certificate; but the Master of the Rolls, (Sir C. C. Pepys,) being of opinion that the case was unprovided

[*264] for by *Lord Eldon's Order of the 5th August, 1818, directed a reference to the Six Clerks, to ascertain whether, previously to that order, the costs of an abandoned motion were costs in the cause, and upon

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(*m*) *Ante*, p. 5. (*n*) Heneage v. Aikin, 1 J. & W. 377.

(*o*) Ord. IV.

(*p*) Brown v. Lockhart, 9 Law J. N. S. Chan. 53; in a more recent case, however, where a similar application was made, which was opposed on behalf of an infant who was entitled to a charge upon the estate, the Vice Chancellor ordered the cause to be advanced, but refused to allow the infant his costs of appearing upon the motion, although he had been served with notice of it, pursuant to his Honor's decision in Powell v. Calloway, 9 Law J. N. S. Chan. 337.—Thornycroft v. Crockett, V. C., Hil. Term, 1841. MSS.

(*pp*) *Vide* Shelly v. Shelly, 8 Ves. 316; Anderson v. Palmer, 14 Ves. 151.

(*q*) 1 Swanst. 128; 3 Mad. 318. (*r*) Withey v. Haigh, 3 Mad. 437.

(*s*) Farquharson v. Pitcher, 4 Russ. 510; and *ante*, vol. 2, p. 367.

(*t*) Warner v. Armstrong, 4 Sim. 140.

those officers certifying their unanimous opinion that they were not, the petition was dismissed with costs. (*u*)

Where an order for the payment of the costs of an abandoned motion has been made, under the above order, a renewed motion, to the same effect as the abandoned motion, cannot be made till the costs have been paid. (*x*)

SECTION III.

By Petition.

A petition is the request of a person in writing, directed to the Chancellor or Master of the Rolls, shewing some matter or cause whereupon the petitioner prays some direction or order. (*y*)

Petitions may be presented, either in a cause or in a matter over which the Lord Chancellor or the Court of Chancery has jurisdiction under some act of Parliament or other special authority. On the present occasion, however, the reader's attention will be directed chiefly to petitions in causes pending in the Court, which for that reason are generally termed "*cause petitions*;" the discussion of petitions in other matters, will be reserved for a future part of the Treatise.

In general, a petition cannot be presented in a cause till the bill has been filed. The case of a plaintiff petitioning to sue in *formâ pauperis*, appears to form an exception to this rule, (*z*) and, in the *Mayor of London* v. *Bolt*, (*a*) Lord Loughborough is reported to have said that he should have no difficulty in granting an injunction to restrain waste, upon petition and affidavit, before bill filed; that he had frequently done so. In that *case, however, [*265] the order was not made till a certificate of the bill having been filed was produced, (*b*) and the practice is now uncommon, though in very pressing cases it may, it is apprehended, be resorted to. (*c*)

A guardian may also be appointed for an infant and maintenance allowed, without bill filed; (*d*) but there is no instance of appointing a receiver of the rents and profits of an infant's estate, where there is no bill depending in the Court. (*e*)

Petitions are sometimes also presented upon collateral matters, as they have relation to some former suit or cause depending, or to an officer of the Court, as to have a clerk's or solicitor's bill taxed, or to oblige him to deliver up papers, &c. (*f*)

Petitions are either for orders of course, or for special orders. Petitions for orders of course are forthwith granted, without any attendance being ordered; if they are for special matters, a day is appointed for hearing them. Most things which may be moved for of course, may also be obtained, as of course, upon petition.

The Lord Chancellor is generally petitioned touching the setting down of pleas, demurrers, or exceptions to be argued before himself or the Vice Chan-

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(*u*) Lewis v. Armstrong, 3 M. & K. 69.
(*x*) Bellchamber v. Giani, 3 Mad. 550.
(*y*) Harr. (Ed. Newl.) 417.
(*z*) Ibid.
(*a*) 6 Ves. 129.
(*b*) 6 Ves. 130.
(*c*) *Vide post*, "Injunction."
(*d*) Exp. Salter, 3 Bro. C. C. 500, and *post* "Applications for Guardian and Maintenance."
(*e*) Anon. 1 Atk. 489; Exp. Whitfield, 2 Atk. 315.
(*f*) Harr. Ed. Newl. 418.

cellor, and concerning special orders made by himself or the Vice Chancellor, and for rehearings; but, in most other cases, application by petition for a matter of course is made to the Master of the Rolls, who may also be petitioned to rehear a cause heard before himself. (*g*)

A cause petition must be properly entitled in the cause in which it is presented, (*h*) and must be addressed to the Judge to whom, according to the regulations made by orders of the 5th April, 1837, such petition ought to be presented.

The petition then states by whom the petition is presented, and the particulars of the case, and concludes with praying the Court to make the order required.

[*266] *Brevity and form are the two things chiefly to be observed in drawing petitions, (*i*) to which may be added care to avoid scandal or impertinence, for which a petition, as well as any other proceeding, may be referred. (*k*)

A petition must be fairly written upon paper, but it need not be written upon parchment. Except it be for a rehearing or appeal, it is not signed by counsel, nor need it be prepared by one. By Lord Coventry's Orders (*l*) it is directed—"for avoiding a multitude of idle petitions, drawn by persons altogether ignorant of the orders and course of the Court, or the true state of the petitioner's business, that petitions, before they be presented to the Lord Keeper or Master of the Rolls, be shewed to that Six Clerk who is the petitioner's attorney in Court, or to his deputy, and by him approved or subscribed, for which no fee shall be taken." This, however, is not to be understood of petitions advised and signed by counsel, nor of petitions containing any matter of complaint against the attorney or his under clerks. (*m*)

Petitions addressed to the Lord Chancellor, must be left with his principal Secretary, who, if it is not for a matter of course, (*n*) will procure it to be answered by means of a memorandum, written at the foot, and signed by his Lordship, directing all parties concerned to attend before him on the next day of petitions, (*o*) unless upon previous application, either to his Lordship or the Vice Chancellor, permission has been given to have the petition answered for an earlier day. When the petition is answered, it is taken away, and a fair copy of it must be left for the use of the Judge.

Petitions addressed to the Master of the Rolls, must be left with the Secre-

[*267] tary at the Rolls, who, if the petition be not of *course, procures it to be answered in the same manner as petitions addressed to the Lord Chancellor.

Formerly the practice upon petitions of course, was for the Secretary to obtain the Master of the Rolls' *fiat*, upon which the order was drawn up and passed, and entered by the Registrar in the same manner as other orders of

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(*g*) Ibid. 419; *et vide ante*, p. 118.

(*h*) If it be for guardian and maintenance, when there is no suit, it must be intitled "*in the matter of A. B. an infant.*"

(*i*) Harr. Ed. Newl. 417.

(*k*) *Ante*, vol. 1, p. 456. It is stated, in Rowe v. Wood, 1 J. & W. 326, n., that there is no instance in which a petition of rehearing has been referred for impertinence; the names of the two counsel who sign the petition, being always considered a sufficient guarantee that it contains nothing improper.

(*l*) Beames's Ord. 84. (*m*) Ibid.

(*n*) Petitions for matters of course, are very seldom presented to the Lord Chancellor; but if they are, upon his Lordship's *fiat* being obtained, they are taken to the Registrar who draws up the order.

(*o*) The days for hearing petitions are generally appointed in the seal paper, issued previously to and after each term.

course; but, by Lord Brougham's Orders, (*p*) with a view to the convenience of the suitors and their solicitors, and for the purpose of diminishing the expense of orders on petitions of course, which according to the practice of the Court, may be presented to the Master of the Rolls, it is ordered, that one of the Secretaries of the Master of the Rolls shall, upon any such petition of course, (*except upon petitions for setting down causes to be reheard,*) which shall be presented to his Honor, instead of answering such petitions as heretofore, draw up the orders thereon in such form as the Master of the Rolls shall, from time to time, direct; every such order to be signed, as passed, with the initials of such Secretary. And it is directed that the Under Secretary shall enter, or cause to be entered, every such order, in a book to be kept at the Secretary's Office, at the Rolls, for that purpose, and shall then mark and sign such order, with his initials, as entered; and that the suitors of the Court and their solicitors shall have access to the said book, during office hours, without the payment of any fee; and it is also ordered that, for every such order so to be made as aforesaid, there shall be paid the same fees as have hitherto been payable in respect of such petitions as aforesaid in lieu of the fees on such petitions; and that there shall also be paid to the Chief Secretary, for filing every such petition, the sum of one shilling; and to the Under Secretary for entering every such order, the sum of sixpence. And every such order, so to be made as aforesaid, shall have the same force and effect as orders of course passed by the Registrars now have, and without the payment of the fees heretofore payable on such orders at the Registrar's Office; and for every office copy that may be required of any such order, there shall be paid to the Chief Secretary (who shall mark the same as examined, and authenticate it by affixing *his initials thereto,) the sum of sixpence and no more for making the same. [*268]

All petitions, except those which are of course, require service upon the adverse party, unless there is no other party interested in the matter, as in the case of petitions for the transfer or sale of stock, or the payment out of Court of money standing to the separate account of the petitioner, in which case no service is necessary.

Every petition which requires service, must be served two *clear* days, of which Sunday is not one, before the day of hearing. (*q*)

Service in cases which do not require *personal* service, is effected by delivering a copy of the petition, as answered, to the adverse Clerk in Court, or to his clerk or agent, at his seat, in the Six Clerks' Office, (*r*) at the same time shewing him the original petition and answer thereto.

Personal service is effected by delivering a copy of the petition to the party, and shewing him the original in the same manner. If the petition require personal service, and the party cannot be found, an application must be made by motion, upon affidavit, for an order to substitute service, by leaving a copy of the petition at the party's dwelling house, or place of abode, with one of the family, or upon the Clerk in Court and solicitor. (*s*)

It is to be recollected that whenever a person *who is not a party* appears in any proceeding, either before the Court or before the Master, service upon the solicitor in London by whom such party appears, whether such solicitor act as principal or agent, shall be deemed good service, except in matters of contempt requiring personal service. (*t*)

Petitions which are not of course are set down in the paper of petitions appointed for the day, and are called on in their regular order. The rules with

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(*p*) Ord. 1833, XXIX.
(*q*) Ord. 1828, XXII.
(*r*) *Vide* the manner of serving notices of motion, *ante* p. 267.
(*s*) 2 Turn. & V. 229.
(*t*) Ord. 1828, XLIV, *ante*, p. 257.

regard to reading affidavits and the general practice upon the hearing are nearly the same as those with regard to motions. (*u*)

[*269] If, upon the hearing, the petitioner does not appear, the petition *will be dismissed with costs, upon the production, by the respondent, of an office copy of an affidavit of service of the petition, made by the person upon whom it was served. (*x*) On the other hand, if no one appears against the petition, an order, conformable to the prayer thereof, will be made on production of an affidavit of the service of the petition upon all the parties interested, provided the case justifies the order. In either case, the affidavit of service must be made and filed before the rising of the Court on that day. (*y*)

In *Garey* v. *Whittingham*, (*z*) Sir T. Plumer, M. R. stated the rule of the Court to be, that a party, who is served with a petition, but who has no interest in the order to be made upon it, is not intitled to the costs of appearing on the hearing of that petition, and, in many cases, the same learned Judge appears to have acted upon that rule and to have refused costs to parties whose appearance was not necessary, but who, having been served, chose to appear. (*a*) Since the death of Sir Thomas Plumer, however, the practice has been altered, and every party who is served with a petition is considered intitled to his costs of appearing upon it, whether he is interested in the matter or not. (*b*)

It may be useful to mention that if a party having an objection to the form of a petition, has also a case upon the merits, he should be prepared with his affidavits in answer to the petition upon the merits, in case the objection to the form should be over-ruled, as the Court will not permit the petition to stand over in order that he may file affidavits, but upon the terms of his paying the costs of the petition standing over, to be taxed by the Master. (*c*)

By the 27th of Lord Brougham's Orders, (*d*) it is directed that, before any order made on a petition be passed, the original petition be filed with the Clerk of the Reports. Where, however, a petition, presented at the Rolls, was afterwards heard, together with other petitions in the same cause, before the

[*270] Lord Chancellor, but before the order was passed, the original *petition was lost, the Lord Chancellor allowed a copy of it, certified by the Under Secretary at the Rolls, to be a true copy to be filed instead of the original petition; (*e*) and where a petitioner, whose petition had been dismissed with costs, refused to deliver up the original petition in order that it might be filed, leave was given, to the respondents, to file, in its stead, the copy of the petition with which they had been served. (*f*)

SECTION IV.

Orders upon.

ORDERS made upon interlocutory applications, except orders made upon petition, as of course, at the Rolls, (*g*) are drawn up, passed, and entered in the same manner as decrees or orders made upon a hearing. (*h*)

(*u*) *Ante*, p. 259.
(*x*) 1 Smith, 76.
(*y*) *Ante*, p. 258.
(*z*) T. & R. 405; *vide etiam* Templeman v. Warrington, 1 J. & W. 377 n.
(*a*) Ibid.
(*b*) Ibid. *notis, et vide* Heneage v. Aikin, 1 J. & W. 377.
(*c*) *Ex parte* Bellott, 2 Mad. 261.
(*d*) Orders, 1833.
(*e*) Sanderson v. Walker, 1 M. & C. 359.
(*f*) Andrews v. Walton, 1 M. & C. 360.
(*g*) *Vide ante*, p. 267.
(*h*) *Vide ante*, vol. 2, 668.

By the 27th of Lord Brougham's Orders, (*i*) it is directed, that in orders made upon petitions, no part of the petition be stated or recited except the prayer, (*k*) and that the same principle of brevity be observed in all the orders of this Court made upon motion, so far as may be consistent with a statement explaining the grounds upon which the order is made, and it is to be recollected, that, by the same order, it is directed that, before any order made on a petition be passed, the original petition be filed with the Clerk of Reports. (*l*)

All interlocutory orders, to have any effect, must be served upon the opposite party. Service is effected by delivering, to the party served, or, where personal service is not necessary, to his Clerk in Court, or his clerk or agent, at his seat, a copy of the order, *shewing him, at the same time, the original.* (*ll*) If *it is intended to enforce the performance of the order by process of contempt, the service of the order must be personal upon [*271] the party to be affected by it, unless a special order has been obtained to authorize substituted service: (*m*) and, where an order was made for the payment of a sum of money by two solicitors, who were in copartnership, service of the order upon one, leaving a copy at the place where the partnership business was carried on, was held not to be sufficient to ground a proceeding for a contempt. (*n*)

Where it is intended to enforce the order by process of contempt, the personal service of the order must be accompanied by service of a writ of execution of it, after which the same process of contempt may be issued as upon decrees and decretal orders. (*o*)

It is to be observed, that no writ of execution can issue against a person not a party to the record; (*p*) where, therefore, it is intended to enforce an order against such a person, the method already pointed out for enforcing the payment of purchase money by a purchaser under a decree must be pursued, (*q*) viz: he must be personally served with the order directing him to pay in the money or do the act which he is ordered to perform; (*r*) and then, upon affidavit of personal service of that order, and production of the Accountant General's certificate that the money is not paid in, or of an affidavit that the act has not been performed, an order may be obtained *upon notice [*272] of motion, (which notice must be also personally served,) that the money may be paid in, or the act required done, within a limited time, (*sil.*

(*i*) Ord. 1833.

(*k*) The form of an order upon a petition is given in the appendix to the above orders.

(*l*) *Ante*, p. 269.

(*ll*) It is absolutely necessary, that the original order should be shewn at the same time that the copy is served, unless the production of the original is waived. Wallis v. Glynn, 12 Ves. 380; Cooper, 282, S. C.

(*m*) *Vide* Hunter v. ——, 6 Sim. 429.

(*n*) Young v. Goodson, 2 Russ. 255. It is to be recollected that an order for payment of costs by two or more, is several as well as joint, and that the *subpœna* may be served upon either or all. *Ante*, p. 91.

(*o*) *Vide ante*, vol. 2, p. 702. (*p*) Anon. 14 Ves. 207.

(*q*) *Ante*, vol. 2, 920.

(*r*) If the order directs the payment of a sum of money to a party, the individual serving the order must be duly authorized to receive it; *ante*, vol. 2, 705; *et vide* Anon. 14 Ves. 207; and must make a demand of it, for the Court will not fix the time of payment until there has been a demand and a refusal to pay. *In re* Isaac, 3 M. & C. 319. It seems, however, that although it is necessary, in order to found process of contempt, for disobedience of an order to pay money, that there should be proof made to the Court of a demand made by a person authorized to receive it; (Wilkins v. Stevens, 19 Ves. 117;) general evidence of such authority will suffice; and that the practice of the Court does not require formal evidence of the due execution of the power of attorney. Sanger v. Gardiner, C. P. Cooper's Rep. 265.

four days,) either from the date of the order or from the day of service, or that the person may stand committed. This is usually called the four-day order or order *nisi*.

It is, however, to be noticed, that this order cannot be obtained, (except in the case of a balance due to a solicitor upon taxation of his bill, (*s*)) unless there has been a previous order limiting a time for payment. (*t*) In orders made upon interlocutory applications it is seldom necessary to obtain a special order for this purpose; since, as we have seen, (*u*) where an act is ordered to be done upon interlocutory application, it is the practice to name the time within which it is to be done in the order; but, where this has been omitted, a special order must be obtained for that purpose, since the four-day order or order *nisi*, for a committal is never granted, unless the previous order specifies the time. (*x*)

The four-day order or order *nisi* having been obtained, and served personally, the party prosecuting the contempt may apply, by motion *ex parte*, that the contemnor may stand committed, producing, at the same time, an affidavit of personal service of the four-day order, and the Accountant General's certificate that the money has not been paid in, or an affidavit that the act required to be done has not been performed. Upon this application the order for absolute committal will be made, upon which a warrant for committal will be signed by the Judge who makes the order, which warrant will be executed by the Deputy Warden of the Fleet attending the Court, and there the process stops, as no sequestration issues against persons not parties to the record. (*y*)

It is stated, in a book of considerable authority upon these points, that the motion for the four-day order may ask that the contemnor may pay the costs
[*273] of the application, but, in **Peasnall* v. *Coultart*, (*z*) Lord Langdale, M. R., said that, upon inquiry into the practice as to this point, it appeared to be the opinion of the most experienced officers of the Court, that it was not regular, in a notice of motion for a four-day order, to ask for the costs, but that, if asked for, it was in the discretion of the Court to give or withhold them; and, in a subsequent case, his Lordship appears to have held that it is unusual to give the costs either of the application limiting the time of payment or of the application for the four-day order which follows. (*a*)

It has been already stated, that interlocutory orders, made upon motion, may be altered, varied, or discharged upon motion; and that orders of course, made upon petition, may be discharged by the same process. (*b*)

Orders made *ex parte*, upon petition, may also be discharged upon motion, where the application is made on the ground of irregularity. The rule is, however, different with regard to orders made upon the merits of a petition duly heard, which, as we have seen, must be the subject of a regular rehearing. (*c*)

It may be noticed here, that an order made by a branch of the Court, which, under the new orders of 1837, has not properly jurisdiction over the cause, must, till discharged, be treated as a valid order, and the party served with such order is not at liberty to treat it as a nullity by obtaining another order inconsistent with it, from the proper branch of the Court. (*d*)

(*s*) *Vide* Stocken v. Dawson, 7 Sim. 547.
(*t*) Parkins v. Morris, 2 Dick. 689; Collins v. Crumpe, 3 Mad. 390; Sanger v. Gardiner, C. P. Cooper's Rep. 262.
(*u*) *Ante*, vol. 2, p. 704.
(*x*) 1 Smith, 441.
(*y*) 1 Smith, 440.
(*z*) 1 Keen, 183.
(*a*) Sanger v. Gardiner, C. P. Cooper's Rep. 262.
(*b*) *Vide ante*, p. 110.
(*c*) Ibid.
(*d*) Williams v. Stevens, L. C. 9 May, 1840.

*CHAPTER XXXII. [*274]

OF INJUNCTIONS.

SECT. I.—*Different Sorts of Injunctions.*

HAVING pointed out, in the last chapter, the general nature of interlocutory applications, and of the practice arising upon them, the writer will now proceed to the discussion of those applications which are most generally addressed to the Court in the course of a cause; and, in doing this, his intention is, in the first instance, to direct the practitioner's attention to applications for those provisional writs which the Court has the power of issuing for the purpose of restraining a party from exercising his ordinary rights in a manner productive of injury to the party applying, pending a litigation in the cause. These writs are writs *of injunction* and of *ne exeat regno*, the former being restrictive of the party's right of action or of property, and the latter of the right, which every British subject enjoys, of quitting the country whenever he may be disposed to do so. (*a*)

A writ of injunction may be described to be a judicial process, whereby a party is required to do a particular thing, or *to refrain from doing [*275] a particular thing, according to the exigency of the writ; the process, however, is rather preventive than restorative, though it is by no means confined to the former object.

Injunctions are either provisional or perpetual: *provisional* injunctions are such as are to continue until the coming in of the defendant's answer; or until the hearing of the case; or until the Master has made his report: *perpetual*, are such as form part of the decree made at the hearing, upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience. (*b*) Injunctions of this nature, however, scarcely come within the scope of the present chapter,—the object of which is chiefly to point out the case in which the Court will grant this writ upon interlocutory applications. (*c*)

Provisional injunctions are generally divided into two kinds, *common* and *special*. *Common injunctions* are those which are granted as of course,—upon a defendant being in default for not appearing or for not answering within the time limited for that purpose by the orders of the Court. *Special injunc-*

(*a*) There are other writs issuing out of the Court of Chancery, which, however, do not come within the description of writs issued upon interlocutory orders. These are writs of *certiorari*, which are the judicial writs issued upon a bill filed expressly for the purpose of procuring them, and will be discussed hereafter; and writs *de homine replegiando*, Harr. Ed. Newl. 562, and of *supplicavit*, ibid. 563, the former of which is nearly obsolete; and the latter of which, not being necessarily returnable in Chancery, can scarcely be said to belong to the equitable jurisdiction of the Court. The present section will be devoted to the consideration of the practice relating to writs of injunction.

(*b*) For. Rom. 194, 195.

(*c*) There is also another species of injunction, which was formerly familiar in practice, viz: injunctions to deliver up possession of property; injunctions of this nature were considered necessary before a writ of assistance could be issued to the Sheriffs, but they have now been discontinued. *Vide ante*, vol. 2, p. 723.

tions are those which are granted upon special grounds arising out of the circumstances of the case; injunctions of this description are issued sometimes on the merits disclosed by the answer, sometimes on affidavits before the answer is filed, and sometimes even without notice and before the defendant has appeared. (*d*)

[*276] *SECTION II.

Of Common Injunctions.

COMMON injunctions are those which are granted upon the defendant's default, either in appearing or answering, and are only applicable to restrain proceedings in the Courts of Common Law.

In order to entitle a party to an injunction by default, there must be a previous good service of the *subpœna*, either in the ordinary way, (*a*) or, if the party is resident abroad, by substitution, to authorize which an order must have been previously obtained in the manner already pointed out. (*b*)

It is to be recollected that, in an injunction cause, it is not, as in ordinary cases, necessary that the bill should be on the file before the *subpœna* is issued; and that if it is on the file at the return of the *subpœna*, or on the opening of the office on the morning after, it will be sufficient. (*c*)

The time for a defendant's appearance named in the *subpœna*, is four days in a town cause, and eight days in a country cause; (*d*) if the defendant fails to appear within that time, he will then be in contempt, and a common injunction will thereupon be ordered as a matter of course. The time within which he must plead, answer, or demur, to prevent the injunction from issuing, is eight days after appearance; (*e*) if he fails to do so within that time, the plaintiff is entitled to move, *as of course*, for the common injunction; (*f*) but the order must recite, as the ground for granting it, that "*the defendant has omitted to put in his answer, plea, or demurrer, within the time limited by the Court in that behalf.*" (*g*)

[*277] *Formerly, it was contrary to the practice of the Court to grant this injunction on any day out of term which was not a seal day; and though the seal was continued beyond the first day, yet if the party was not in a situation to move for it on the first day of the seal, it could not be moved for on any other day to which the seal was adjourned; (*h*) but now a

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(*d*) Beames's Ord. 16.
(*b*) Ibid. p. 562.
(*d*) *Vide* form of *subpœna*, Ord. 1833.
(*f*) Ibid.
(*a*) *Ante*, vol. 1, p. 563.
(*c*) Ibid. p. 563.
(*e*) Ibid.

(*g*) Ord. 1833, XI. Under the old practice, if a defendant did not demur, plead to, or answer the bill, within eight days after appearance, inclusive of the day of appearance, he was considered in contempt, and an injunction might be thereupon obtained; so also if to avoid being in contempt, he sued out what was termed a *common dedimus*, or obtained an order for time, the injunction might be obtained. The orders of 1828 having, however, abolished the *common dedimus*, and extended the time for putting in a plea or answer, to eight weeks in a town cause, or ten weeks in a country cause, (*ante*, vol. 2, p. 273;) before which time, the defendant cannot be in contempt, for not answering, &c.; the common injunction can no longer be said to issue upon contempt, or upon obtaining a *dedimus*, or an order for time, and therefore this order has been made to render the recital conformable with the practice.

(*h*) Sharp v. Ashton, 2 V. & B. 412; Rowe v. Jarrold, 5 Mad. 45.

plaintiff may make this motion on any day out of term on which motions are made, or indeed on any day on which the Court is sitting. (*i*)

We have seen that the 10th order, did not apply to injunctions to be obtained on amended bills, the consequence of which was, that before a plaintiff could be entitled to an injunction on an amended bill, he had to wait till the five weeks had expired which were allowed by the same order for answering it, and then, but not before, if the defendant was in default, he might move for the injunction, upon special motion supported by an affidavit of merits. (*k*) This inconvenience has, however, been remedied by Lord Cottenham's Orders, (*l*) by which it has been ordered, "that, in case an injunction to stay proceedings at law, shall be prayed for by the bill, and shall either not be obtained, or, having been obtained, shall have been dissolved upon the merits stated in the answer, and the plaintiff shall afterwards amend his bill; and the defendant shall not plead, answer, or demur to the amended bill, within eight days after appearance, the plaintiff shall be entitled to move for an injunction, *upon affidavit of the truth of the amendments.*" (*m*)

It is to be observed that, in a case subsequent to *Lee* v. *Ravenscroft*, (*n*) above referred to, the Vice Chancellor held, that *the rule which [*278] he had laid down in that case did not apply where the plaintiff amends the bill before the defendant's appearance. (*o*)

It is clear, from the foregoing remarks, that there are only three ways of preventing the common injunction from issuing, viz: by putting in a plea, an answer, or demurrer, before the injunction is issued. If a demurrer is filed within the eight days limited by the 10th order, or indeed any time before the order for the injunction is made, the plaintiff cannot move for an injunction till the demurrer has been disposed of; for, as the demurrer insists that the plaintiff has no equity, it is by no means clear, till it has been heard, that the injunction ought to go. (*p*) The same rule applies where a plea is put in before the injunction has been ordered; (*q*) but, lest these defences should be put in for the mere purpose of creating delay, the Court, on a proper application, will order them to be accelerated and argued immediately, and if they are over-ruled on argument, the injunction will follow. (*r*)

To prevent the common injunction from issuing, by filing an answer, the answer should be *upon the file* within eight days after the defendant's appearance, or at least before the order for the injunction is made; and it will not be sufficient that the answer should be sworn to before the writ issues, if it is not actually filed *before the order is made*, (*s*) the rule being, that an injunction takes effect from the date of the order, and not from the time of sealing the injunction. (*t*)

(*i*) Brierley v. Walmsley, 1 Keen, 141; the Earl of Chesterfield v. Bond, 2 Beav. 263; *ante*, p. 250.

(*k*) Lee v. Ravenscroft, 6 Sim. 474; *ante*, vol. 1, p. 535.

(*l*) Ord. 9 May, 1839, III.

(*m*) Before this order, an affidavit of merits was required, even when the application was made upon the defendant's default. *Ante*, vol. 1, p. 535.

(*n*) 6 Sim. 474.

(*o*) Brown v. Newall, V. C. May 22, 1837; Cooke's Orders, 2 ed. 1838.

(*p*) *Ante*, vol. 2, p. 84; Cousins v. Smith, 13 Ves. 164.

(*q*) *Ante*, vol. 2, 219; Anon. 2 Atk. 113; Humphreys v. Humphreys, 3 P. Wms. 348.

(*r*) *Vide ante*, vol. 2, p. 84, 219. (*s*) Bruce v. Webb, 3 Mer. 474.

(*t*) Rattray v. Bishop, 3 Mad. 220. Where, owing to the delay in filing a demurrer, judgment had been obtained at law, and the plaintiff in equity was taken in execution, Lord Eldon discharged him out of custody on his undertaking to confess judgment *de novo*, so that he might not afterwards say that the judgment had been satisfied by the execution from which he had been discharged. Franklyn v. Thomas, 3 Mer. 225.

It is also necessary that the answer should be sufficient, for an answer that is insufficient cannot be said, in a correct sense, to be an answer to the bill, (*u*) therefore, in that case, the *plaintiff is entitled, immediately, to take exceptions to the answer, and he may refer them to the Master, *instanter*, without waiting the eight days, which are usually allotted to a defendant, to see whether he will submit to them or not; (*x*) and, if the answer is reported to be insufficient, the plaintiff may obtain the common injunction for want of an answer, and the order for it will be made accordingly, upon the usual application by motion. The defendant, however, may deprive the plaintiff of this benefit, by putting in a further answer before the Master has made his report; and then, when exceptions are taken, and the injunction depends on the report, it becomes, as it was called in *Knox* v. *Symmonds*, (*y*) a kind of race to be run between the parties; the plaintiff seeking to obtain his order before the defendant has put in his further answer, and the defendant seeking to put in his further answer before the plaintiff has obtained his order. (*z*)

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The order for the injunction having been obtained and passed and entered, must be taken to the plaintiff's Clerk in Court, whose duty it is to make out the writ and to get it sealed.

It is to be observed, that as an injunction takes effect from the date of the order, and not from the time of sealing the injunction, it may, in many cases, be desirable to serve the party, or his attorney or agent, with the order, without waiting for the writ, (*b*) as where it has been pronounced before the action at law has been commenced or the declaration delivered, in either of which cases, as we shall see presently, (*c*) the injunction will operate to stay trial without further order.

The common writ of injunction is in the nature of a letter from the Sovereign, under the Great Seal of Great Britain, addressed to the defendant, his counsellors, attorneys, solicitors, and agents, and is usually in the following form:—

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*Victoria, &c. To C. D., his counsellors, attorneys, solicitors, *and agents, and every of them, greeting: Whereas it hath been represented unto us in our Court of Chancery, on the part of A. B., complainant, that he hath lately exhibited his bill of complaint into our said Court of Chancery, against you the said C. D., defendant, to be relieved touching the matters therein contained; and that you, the said defendant, being sued with a writ issuing out of our said Court, commanding you to appear to and answer the said bill, have not obeyed the same, [but are in contempt to an attachment for not appearing to and answering the said bill,] or to which bill you appeared, but for delay have put in an insufficient answer, [or have not put in your answer within the time limited for that purpose by the said Court,] and yet, in the meantime, you unjustly, as is alleged, prosecute the said complainant at law touching the matters in the said bill complained of: We, therefore, in consideration of the premises, do strictly enjoin and command you, the said C. D., and all and every the persons before mentioned, under the penalty of two hundred pounds, to be levied on your and every of your lands, goods, and chattels, to our use, that you and every of you do absolutely desist from all further proceedings at law against the said complainant touching any of the matters in the said bill complained of, until you, the said defendant, shall have fully answered the said bill,*

(*u*) Gregor v. Lord Arundel, 8 Ves. 87. (*x*) *Vide ante*, vol. 2, p. 310.
(*y*) 1 Ves. 87.
(*z*) Ibid.; Wynne v. Jackson, 2 S. & S. 226; Ingham v. Ingham, 6 Sim. 363.
(*a*) 1 Turn. & V. 965. (*b*) Rattray v. Bishop, 3 Mad. 220.
(*c*) *Post*, 281.

[*cleared your contempt*, (*c*)] *and our said Court shall make other order to the contrary; but, nevertheless, the said defendant is at liberty to call for a plea, and to proceed to trial thereon, and, for want of a plea, to enter up judgment: but execution is hereby stayed.* Witness Ourself, at *Westminster*, this —— day of ———, in the —— year of our reign.

The writ having been obtained must be *personally* served upon the party, and upon his attorney or agent, by delivering to and leaving with each of them a correct copy of the injunction, and at the same time shewing him the orginal writ under seal. (*d*)

*If the party himself is abroad, and substituted service of the *subpœna* upon his attorney-at-law has been ordered, (*e*) the injunction may be served upon the attorney-at-law, or on the agent, only, but the service upon him must be personal. [*281]

Where an injunction has issued *irregularly*, the defendant is intitled to have the order discharged; but any act of his, founded upon it, is a waiver of the irregularity, (*f*) and it has, accordingly, been determined that a defect in the injunction will be cured by the defendant putting in his answer and moving to dissolve. (*g*)

The effect of a common injunction depends on the state of the proceedings at law;—if the injunction be obtained before a declaration has been delivered, it restrains all proceedings. For the terms of the common injunction, which leave the defendant at liberty to call for a plea, have only a reference to a person supposed to be in a condition to demand it, and, therefore, the mere delivery of a declaration, and, *a fortiori*, any further step in the action would be treated as a breach of the injunction. (*h*) If, however, the plaintiff at law has actually delivered his declaration, he is then permitted, by the express words of the order, to call for a plea and to proceed to trial, or, for want of a plea, to enter up judgment; wherefore, in that case, he may proceed so far that he may be in a situation, *eo instanter* that the injunction shall be dissolved, to take out execution, for that is the only step in the action which the Court intends to stop. (*i*) But, as the plaintiff at law is thus left at liberty to proceed to trial, it is obvious that the plaintiff in equity would have but very inadequate relief, if he could only obtain the common injunction, when his defence to the action depends upon facts which rest within the knowledge of his opponents; therefore the Court will, in such cases, not only restrain the taking out execution, but it will also, where the *discovery is material to the defence, extend the injunction *to stay the trial* until the answer has been put in. [* *282]

To procure this extension, the plaintiff must obtain the common injunction in the first instance, and then move to extend it to stay trial; (*ii*) and it is to be

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(*c*) If the defendant is not in contempt, these words are not inserted.

(*d*) 1 Turn. & V. 965. It seems that the person serving the writ, although obliged to produce it to the party served, is not obliged to deliver the writ to be compared with the copy served. Woodward v. King, 2 Ca. in Ch. 203.

(*e*) *Ante*, vol. 1, p. 262.

(*f*) Eden on Inj. 88; Travers v. Lord Stafford, 2 Ves. 20, 22.

(*g*) Davile v. Peacock, Barnard. 27.

(*h*) Morrice v. Hankey, 3 P. Wms. 147; Garlick v. Pearson, 10 Ves. 451-2; Bullen v. Ovey, 16 Ves. 144; Mills v. Cobby, 1 Mer. 3.

(*i*) Morrice v. Hankey, *ubi supra*; Sidney v. Hethrington, 3 P. Wms. 146, n. B.; Garlick v. Pearson, *ubi supra*.

(*ii*) Bailey v. Weston, 7 Sim. 6 66. The Court has refused to relax this rule on the ground that the practice of the Courts of Law, as altered in 1834, did not allow sufficient time for the plaintiff to obtain the common injunction and then to move to extend it to stay trial, ib.; *sed vide*, Hine v. Tiddes, 3 S. & S. 370.

remarked that the common injunction must have been obtained against the person in whose name the action is brought; therefore, where an action was brought against the plaintiff in the name of an officer of a public company, and the plaintiff filed his bill against the officer and some of the directors, and obtained a common injunction against the directors, an order, which he had obtained from the Vice Chancellor, to extend the injunction to stay trial, was discharged by the Lord Chancellor. (*ii*)

A motion to extend an injunction to stay trial must be made upon notice, and it is observable that the plaintiff cannot make the motion on the same day that he moves for the common injunction, for want of an answer. (*k*) The plaintiff must support his application by an affidavit stating not only that he cannot safely go to trial until the defendant has answered, (for it may be perfectly true that he cannot go safely to trial, either with or without answer,) *but it must also aver that he verily believes that the answer will furnish a discovery which will assist him at law, and which is material to his defence* in the action, (*l*) though the affidavit need not be particular as to the kind of discovery expected, unless the defendant is abroad. (*m*) If, however, it appears, upon the whole case taken together, that the plaintiff's allegation that the discovery [*283] *will be material to his defence at law, cannot be true, the order will be discharged. (*m*)

It is no objection to a motion of this nature to say, that the defendant, by the rules of the Court, is bound to answer before the trial takes place, for though he may and ought to put in his answer in due time, yet, if he shuffles, there are no means of knowing when you will be able to get a full answer. (*n*) If, however, a full answer is actually put in before the motion is made, it is a sufficient objection to the application; for, as the discovery is thereby obtained, there is no reason why the trial should be stayed any longer: (*o*) but the answer to be available, ought to be filed, at the latest, at eight o'clock in the evening before the day for which the notice of motion is given, (*p*) otherwise the plaintiff would have no opportunity of seeing whether the answer is sufficient or not. (*q*)

The answer must also be sufficient, otherwise it is no answer; and where the defendant, upon exceptions taken, had submitted to answer them, the order extending the injunction was made. (*qq*) So where, after an answer reported insufficient, the plaintiff obtained the usual order for leave to amend, and for the defendant to answer the amendments and exceptions at the same time, and amended the bill accordingly, an order, subsequently obtained, to extend the injunction to stay trial, was held to be regular. (*r*)

If the plaintiff has been guilty of great delay in applying to extend the injunction to stay trial, or if he postpones it till the assizes are just coming on, the Court will look very anxiously to see how the delay is accounted for before

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(*ii*) Thorpe v. Hughes, 3 M. & C. 742.

(*k*) Wright v. Braine, 3 Bro. C. C. 87; Garlick v. Pearson, 10 Ves. 450. Where the plaintiff had been prevented from obtaining the common injunction by a demurrer, the arguing of which had been postponed by the defendant, the injunction to stay trial was granted in that instance; Raphael v. Birdwood, 3 Mer. 229 n.

(*l*) Appleyard v. Seton, 16 Ves. 223; Bishton v. Birch, 2 V. & B. 41; Earnshaw v. Thornhill, 18 V. 488; White v. Steinwacks, 19 Ves. 84; Eden. 84.

(*m*) Farrar v. Lewis, 2 Dick. 729; Revet v. Braham, 2 Bro. C. C. 640.

(*m*) Thorpe v. Hughes, *ubi supra, et vide* White v. Steinwacks, 19 Ves. 83.

(*n*) Taylor v. Leigh, 2 J. & W. 388. (*o*) Bishton v. Birch, 2 V. & B. 40.

(*p*) Whitehouse v. Hickman, 1 S. & S. 102; Munnings v. Adamson, 1 Sim. 510; Thompson v. Byrom, 2 Beav. 15.

(*q*) See Sir S. Romilly's argument in Bishton v. Birch, 1 V. & B. 366.

(*qq*) Ibid. (*r*) Simes v. Duff, 8 Sim. 270.

it will grant the extension; indeed it will generally refuse it, because when the cause is ready to be heard, and the evidence is prepared, and the witnesses are in attendance, the injunction could not *be granted without putting [*284] the other party to considerable inconvenience and expense. (r)

The order to extend an injunction to stay trial must be drawn up, passed, and served in the usual way.

It may here be noticed, that an order for extending the common injunction to stay trial, falls with the injunction and requires no separate order for its discharge, nor need it be mentioned in the order to dissolve the injunction.

An order of this nature, however, cannot be discharged upon the coming in of the answer, separately from the injunction. (s) Upon an application being made for this purpose, it was contended that this was a distinct substantive order, obtained upon affidavit, and that the plaintiff, having gained the discovery he sought, ought not to refuse to go to trial; but Lord Eldon observed, that the order, with reference to the future progress of the cause, put the plaintiff at law in precisely the same situation as if the bill had been filed before the action commenced; that the practice ought to be kept whole; that it might be just as inconvenient not to be permitted to commence an action, as to be restrained from proceeding in it; and that, as in the one case, the plaintiff at law was not at liberty to commence, so, in the present case, he ought not to be permitted to proceed to trial, until the sufficiency of the answer was proved in the usual way, viz: by the order *nisi*, subject to shewing exceptions for cause, or cause upon the merits: (t)—in a subsequent case he expressed a similar opinion. (u)

In these cases, his Lordship laid great stress upon the circumstance that, among the numerous cases that had occurred of injunctions extended to stay trial, he did not recollect, either in the books or in practice, a single instance of an application to dissolve an injunction, so far as it restrained the trial, distinct from an application to dissolve it generally. (x) *It seems, however, that where a *special* injunction has been granted, *after answer*, [*285] restraining the defendant from proceeding to trial *till the further order of the Court*, there can be no objection to the injunction being dissolved, so far as it extends to stay trial only. (y)

As the common injunction is to continue *until answer and further order*, the defendant must put in his answer before he can apply to dissolve it. (z) When he has filed it, he may then obtain, upon motion or petition as of course, an order *nisi* for that purpose, of which the plaintiff is intitled to two clear

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(r) Blacoe v. Wilkinson, 13 Ves. 454; Field v. Beaumont, 1 Swanst. 209; 3 Mad. 102, S. C.; Thorpe v. Hughes, 3 M. & C. 742.

(s) Eden on Injunctions, 93.

(t) Earnshaw v. Thornhill, 18 Ves. 485.

(u) Bishton v. Birch, 2 V. & B. 40.

(x) There is one case, however, which has been cited for another purpose from the Registrar's book, in which such an application appears to have been granted. The plaintiffs had obtained the common injunction on the 3rd of February, 1738, which was a Saturday; the defendant not having put in his answer, they moved to extend the injunction to stay trial, but, the defendant's counsel stating that the answer would be put in on Monday, the Court made no order. On the 6th of February, the answer not having been put in, the plaintiffs renewed the motion, which was granted. On the 12th, the defendant having put in his answer, moved to discharge that order only, which, upon hearing the plaintiff's counsel, and the defendant's answer read, was discharged accordingly. Royal Exchange Assurance v. Barker, 1 V. & B. 367. And, in a recent case of account, where the defendant being of unsound mind, the answer was put in by a guardian, who was unable to give a full discovery: a common injunction was dissolved upon shewing cause so far only as it extended to stay trial. Barrett v. Tickell, Jac. 154.

(y) Raphael v. Birdwood, 1 Swanst. 228.

(z) There is a note of a case in Banbury in which an injunction was continued because the defendant had not signed his answer; Anon. Banb. 251.

days' notice. (*a*) The *nisi* terms in which the order is drawn are—"*that the injunction shall be dissolved, unless the plaintiff, on a given day, shall shew good cause to the contrary;*" and the ground on which the order is made is, that the plaintiff may have time to look into the answer to see whether it is sufficient or not, for, upon seeing the answer, he determines in what way he shall meet it. (*c*)

It may be mentioned, in this place, that, in general, where there are several [*286] defendants injoined, the Court will not dissolve *an injunction till all have answered. (*d*) An instance of exception to this rule, however, is afforded in the case of a bill brought against a trustee and his *cestui que trust*, which the trustee will not answer; in such case, it seems, the Court will dissolve the injunction on the application of the *cestui que trust;* (*e*) and it is to be observed, that where an injunction has been obtained to restrain an action brought by a *cestui que trust* in the name of his trustee, a *special* application may be made to dissolve it; and that it is not necessary to obtain an order *nisi*, and then to move to make it absolute. (*f*)

Another instance of exception to this rule is afforded by the decision of Lord Eldon, in *Joseph* v. *Doubleday*. (*g*) In that case an injunction had been obtained to restrain several defendants, consisting of the assignees of some bankrupt partners, and the partners remaining solvent, from proceeding at law upon a verdict which they had obtained. The solvent partners having put in their answer, had obtained the common order *nisi*, although the other defendants had not answered. Lord Eldon was of opinion that cases might exist, where the circumstance of some of the defendants not having put in their answer, would not be a sufficient ground against dissolving the injunction. His Lordship, however, did not determine it then, as exceptions were taken to the answer. The solvent partners afterwards put in a further answer, and the assignees put in their answer to which exceptions were taken. The solvent partners afterwards obtained an order *nisi* to dissolve the injunction *only as against them*, which was made absolute; they then obtained an order *nisi* for dissolving the injunction against *all the defendants*, although the assignees had not put in their further answer to the exceptions, and Lord Eldon, upon the [*287] motion to make that order absolute, declared his opinion *that it was competent for the solvent partners to make this motion, but that the injunction could not be dissolved pending the exceptions to the answer of the assignees.

It may be collected, from what has been said in an early part of the present Treatise, (*h*) that considerable uncertainty exists as to whether a bankrupt can be made party to a bill against his assignees for the mere purpose of eliciting

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(*a*) Ord. 1828, XXIII. Formerly this order could only be obtained upon motion, which could only be made out of term upon a seal day; *vide* Sharp v. Ashton, 2 V. & B. 413; so that a defendant was frequently obliged to wait for a week after he had put in his answer before he could obtain an order *nisi* to dissolve the injunction. It was to obviate this inconvenience that the above order was framed.

(*c*) Lacy v. Hornby, 2 V. & B. 292.

(*d*) Prac. Reg. 234; Boheme v. Porter, Barnard. 352; Rowcroft v. Donaldson, 1 Fowl. Ech. Pr. 286.

(*e*) Ld. Delvin v. Smyth, Mos. 354. In the case referred to, the application to dissolve the injunction was made by the *cestui que trust*, although he was no party to the suit, and the order appears to have been justified by the collusion which existed between the trustee and the plaintiff.

(*f*) Sharpley v. Perring, 8 Sim. 600; it is presumed the same rule will apply to injunctions to restrain proceedings brought by an assignee *of a chose in action* in the name of the assignee.

(*g*) 1 V. & B. 497.

(*h*) *Ante*, vol. 1, p. 249, 250.

from him a discovery as to the facts of the case. That he cannot be made a party for the purpose of relief, unless in cases of fraud or collusion, is undoubted; but still it is doubtful whether he can be made a party for the purposes of discovery and injunction merely; but, if the Court should be of opinion that he might, there can be little doubt but that, under such circumstances, it would not entertain a motion to dissolve the injunction till the answer of the bankrupt should have come in.

It is said that the order *nisi* for dissolving an injunction may be made absolute notwithstanding the plaintiff has become bankrupt, (*i*) but as it seems to be now settled that the bankruptcy of a plaintiff causes an abatement of the suit, (*k*) it is presumed that a motion to make an order for dissolving an injunction, absolute, cannot be made, in such a case, till after the assignees have been brought before the Court.

The order *nisi* must be drawn up, entered, and served on the plaintiff's clerk in Court, and if, on the day appointed to shew cause, no cause is shewn, the injunction will be dissolved of course, on motion and production of an affidavit of service of the order *nisi*. (*l*) The time within which cause is to be shewn is generally four days, but the plaintiff is usually indulged with a short time, upon his undertaking not to except, but to shew cause upon the merits. (*m*)

The reason why this is an order *nisi*, is, not that the plaintiff may have time generally, but merely that he may have time to look into the answer and consider whether he will take exceptions or shew cause upon the merits. It has, therefore, been decided, that where exceptions have been taken and the answer has been found sufficient, it is not necessary *again* to *obtain the [*288] order *nisi*; the defendant may then move to dissolve the injunction absolutely in the first instance; as it is plain, from his taking the exceptions, that he has already obtained the necessary information. (*n*) In *Bishton* v. *Birch*, (*o*) Lord Eldon considered the plaintiff, who had taken exceptions, as having precluded himself from the benefit of the order *nisi*.

If a plea is ordered to stand for an answer, with liberty to except, the defendant cannot move to dissolve the injunction *absolutely*, he can only move, as upon coming in of an answer, that it may be dissolved *nisi*. (*p*) But, if a plea is *allowed*, he may move to dissolve absolutely in the first instance. (*q*)

When the defendant moves to make the order *nisi*, to dissolve the injunction absolute, the plaintiff may shew for cause against dissolving the injunction,—1st, That he has referred it for impertinence; 2nd, That he has taken exceptions to it for insufficiency; or, 3rdly, That there is sufficient equity disclosed by the answer to induce the Court to continue it till the hearing; which is called "*shewing cause upon the merits.*" The plaintiff may also avail himself of the opportunity afforded by the defendant's moving to make the order for dissolving the injunction absolute, to shew that the case is one of those which fall within the exception already referred to. (*r*)

1. The course of proceeding necessary to entitle the plaintiff to shew a reference for impertinence as cause against dissolving an injunction, and the consequence of such a reference, have been already pointed out. (*s*)

2. The practitioner has also been made acquainted with the effect of exceptions for insufficiency upon a motion to dissolve. (*t*) It is important that, before

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(*i*) Anon. 1 Atk. 262.
(*k*) *Vide ante*, vol. 1, p. 78.
(*l*) Harr. Pr. 547.
(*m*) *Vide post*, p. 289.
(*n*) Lacy v. Hornby, 2 V. & B. 291; *ante*, p. 285.
(*o*) 2 V. & B. 44.
(*p*) Osborn v. Cowper, Mos. 198.
(*q*) Phillips v. Langham, cited 2 Dick. 537; *et vide post*, p. 295.
(*r*) *Ante*, p. 285.
(*s*) *Ante*, vol. 2, 297.
(*t*) *Ante*, vol. 2, 309, 314, 318.

he determines to shew exceptions for cause against dissolving the injunction, he should recollect that he cannot afterwards shew cause upon the merits, nor can he revive the injunction upon merits confessed in the same answer. (*u*)

[*289] *3. If the plaintiff intends *to shew cause on its merits*, it is usual to indulge him with time for that purpose, until the next day of motions; but, as such a practice would be very inconvenient at the last seal before the long vacation, (for in fact it would be continuing the injunction for three months,) he will, then, be ordered to shew cause during the hearing of the petitions which the Court is then accustomed to take. (*x*)

It is to be observed, that an extension of time for shewing cause against dissolving an injunction, is only granted upon the plaintiff's undertaking to shew cause upon the merits, and that, after such an enlargement of time, the plaintiff cannot shew exceptions for cause. (*y*)

When the time comes for shewing cause upon the merits, the plaintiff's counsel commences the discussion, after which he is answered by the counsel for the defendant; and it is to be recollected, that, after the defendants counsel have been heard, the counsel for the plaintiff is not entitled to a reply. (*z*)

In shewing cause against dissolving the injunction, it is a general rule that nothing can be read in opposition to what appears on the face of the answer; accordingly, the case of *Isaac* v. *Humpage*, (*a*) in which Mr. J. Buller (upon an application after answer for an injunction to restrain execution on a verdict,) permitted affidavits to be read in contradiction to the answer, has been since repeatedly over-ruled: (*b*) and it has been established that, except in the case of waste, to which the facts in *Isaac* v. *Humpage* were erroneously assimilated, affidavits will not be received in contradiction to assertions positively made by the answer. (*c*) It is to be remarked, however, that the answer is only evidence as to facts to which other testimony could be received, and therefore an answer, which alleged that the true intention of the parties to a written agreement was contrary to what appeared on the face of it, was not admitted. (*d*)

[*290] *It is stated by Lord Eldon, in *Morgan* v. *Goode*, (*dd*) that the Court, in former instances, had admitted affidavits to be read in support of allegations made by the bill, where those allegations related to acts of the parties, and the defendant, by his answer, had neither admitted nor denied the truth of them. The practice, however, appears to have been laid down too generally, and, in a subsequent case, (*e*) his Lordship said—"he did not recollect that the exception to the rule, as to affidavits, had been carried further than this—*that if deeds or letters be stated in the bill, and the defendant says he does not know whether the statement is correct or not, then you may verify them by affidavit;* (*f*) but as to facts which the defendants do not know of, you cannot have the benefit of them at all, except so far as you may be able to prove them at the trial." And this appears to be the present practice of the

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(*u*) Ibid. 309.
(*x*) Robinson v. Wardell, 5 Ves. 552, and see Rew v. Dixon, 2 Mad. 258.
(*y*) Pinheiro v. Porter, 3 Swan. 362, n. (*z*) *Ante*, p. 272.
(*a*) 1 Ves. Jr. 427; 3 Bro. C. C. 463. (*b*) Eden on Inj. 108.
(*c*) Lane v. Williams, 6 Ves. 798; Hanson v. Gardiner, 7 Ves. 308; Berkeley v. Brymer, 9 Ves. 355; Norway & Rowe, 19 Ves. 148.
(*d*) Bott v. Birch, 4 Madd. 255. (*dd*) 3 Mer. 10.
(*e*) Barrett v. Tickell, Jac. 156.
(*f*) *Vide* Hodgson v. Dean, 2 S. & S. 221; and Taggart v. Hewlett, 1 Mer. 499, in which Lord Eldon said that, according to the old practice, the plaintiff might have left these letters in the hands of his Clerk in Court, and have called upon the defendant, by his bill, to inspect them before he put in his answer, and then to say, whether they were of the testator's handwriting or not, but that the modern practice was to allow documents of this sort to be verified by affidavit.

Court, and has been so determined by the Vice Chancellor in a recent case, (*g*) in which, upon shewing merits, confessed in the answer, as cause against dissolving an injunction, the plaintiff's counsel tendered an affidavit to substantiate certain allegations in the bill, as to which the defendant stated, in his answer, that he was ignorant, and the Vice Chancellor refused to receive it, saying that the point was quite settled.

The rule, however, that affidavits cannot be read in *contradiction* to the answer, is absolute, and the attention paid to it by the Court is strongly illustrated in the case of *Clapham* v. *White*, (*h*) before Lord Eldon. In that case, an injunction had been dissolved, upon the coming in of an answer denying all the circumstances of the bill; but a true bill for perjury, upon that answer, had been found against the defendant by the grand jury. Upon this the plaintiff moved to revive the injunction; and, in support of the motion, a passage was cited from Tothill, p. 114, stating, that where there was a prosecution for perjury the *Court granted an injunction; but Lord Eldon, after noticing that, independent of that *dictum*, there was no trace of [*291] any such practice, and that he should be exceedingly unwilling to make a precedent for the first time, added, "if the answer denies all the circumstances upon which the equity is founded, the universal practice, as to the purpose of dissolving or not reviving the injunction, is to give credit to the answer; and that is carried so far, that, except in the few excepted cases, though five hundred affidavits are filed, not only by the plaintiff but by many witnesses, not one could be read as to this purpose: that being the rule, and the injunction being dissolved upon the credit given to the answer for this purpose, the question is, whether the answer is to be thus accused (for it is no more,) of perjury; the difficulty as to the principle is, that the grand jury may have believed, and in most cases must have believed, those very persons upon their oaths for that purpose, whose depositions this Court would not permit to be read for the purpose of discrediting the answer; it is therefore, in a circuitous way, destroying the rule of this Court."

Where a defendant refers, by his answer, to the answer of a co-defendant, it may be read against him upon a motion for an injunction. (*k*)

Where the merits of the plaintiff's bill have been so far confessed, by the answer, as to render it proper for the Court to sustain the injunction, it will be continued to the hearing; but an injunction is never continued to the hearing as a *matter of course*. It was in one case contended, before Lord Hardwicke, that if there is such a doubt, that the Court may, at the hearing, decree either the one way or the other, it is a reason to continue the injunction till the hearing; his Lordship, however, over-ruled this argument without any hesitation. (*l*)

There are many cases, however, in which the Court will only continue the injunction upon the condition of the plaintiff *paying a certain sum [*292] of money into Court; as for instance, where there has been a verdict at law, (*m*) or an award for a sum of money, (*n*) or where the defendant has sworn, by his answer, that a sum of money is due to him. (*o*)

(*g*) Castellain v. Blumenthal, V. C. Mar. 9, 1841, and *vide post*, pp. 345, 357.
(*h*) 8 Ves. 35.
(*i*) *Vide* Eden on Injunc. 110.
(*k*) Anon. 1 P. Wms. 311.
(*l*) Potter v. Chapman, Amb. 98; Eden on Injunc. 112.
(*m*) Prac. Reg. 237, 240; Harr. ed. Newl. 550.
(*n*) Prac. Reg. 242; Harr. ed. Newl. 549.
(*o*) Prac. Reg. 238; Harr. ed. Newl. 549.

The old practice, in these cases, was, that the Court always dissolved the injunction, or refused it where not already obtained, unless the defendant gave a judgment at law for the money sworn due, and a release of errors; (*p*) though in one case, Lord Keeper North is represented as objecting to this as not sufficiently beneficial to the defendant; since, notwithstanding the release of errors, the plaintiff might bring his writ of error, and put the defendant to plead his release and so cause delay. (*q*) The usual mode, however, at present, is, to order the money to be paid into Court, for which reasonable time will be given, according to the greatness of the sum, or the distance of the party; this, however, will not be done where there is matter confessed in the answer sufficient for a total relief; (*r*) and, in general, the practice is confined to cases where the money has either been found due by verdict or award, or is sworn to be so by the answer. (*s*)

In the following case, however, an extension was, from peculiar circumstances, made of the general rule; the plaintiffs, seventy-two in number, who were underwriters, had filed a bill to furnish themselves with defences to actions brought against them on certain policies of insurance, alleging fraud in the assured. Four of the causes had been set down for trial, and, in consequence of a mistake by the defendant's attorney, had been tried, and verdicts had been obtained in them for the defendants in equity. A number of the plaintiffs then paid into the hands of certain persons named in an agreement signed by them, the amount of their several subscriptions in trust, to be applied in satisfaction of whatever judgment was pronounced by the Court of Law. An injunction [*293] having been afterwards obtained, for want of the answer of one of the *defendants, a motion was made that the injunction might be dissolved, or that such of the plaintiffs as had not deposited the money claimed on the losses subject to the deed of trust, should pay that money into Court within fourteen days, to abide the event of the actions at law, otherwise the injunction to be dissolved as to them; and this motion was, upon argument, granted. (*t*)

The abuses likely to arise from the facility with which injunctions to stay proceedings at law were formerly obtained, in cases where the plaintiff at law was abroad, and consequently unable to appear or answer in time, have long since attracted the attention of the Courts which have in some measure obviated them, by requiring, from the plaintiff in equity, an affidavit of the merits of his case. (*u*) As a still further check to such abuses, a further rule has been adopted, under which, whenever the plaintiff at law, being abroad, has recovered a verdict, and an injunction has been obtained for want of appearance or answer, an order may be made, upon the application of the defendant, that the plaintiff in equity shall pay into Court, within a reasonable time, (generally a month,) the money so recovered, or, in default thereof, that the injunction shall be dissolved; (*x*) this order, however, will not be made without an affidavit in answer to the material allegations of the bill; and several motions upon this subject have been ordered to stand over, to give the defendants time to file satisfactory affidavits; and though it is stated, in the argument of *Culley* v. *Hickling*, (*y*) that Lord Bathurst granted the motion in *Weskett* v. *Carnevali*, (*z*) without an affidavit, this appears to have been a mistake. (*a*)

(*p*) Prac. Reg. 240, 242.
(*q*) Anon. 1 Vern. 120.
(*r*) Toth. 37.
(*s*) Eden Injunct. 113.
(*t*) Kensington v. White, 3 Pri. 164.
(*u*) *Ante*, vol. 1, p. 263.
(*x*) Weskett v. Carnevali, 2 Bro. C. C. 182, n.; Coglan v. Requeneau, ib.; Mitchell v. Davis, cit. ib.; Potts v. Butler, ib.; 1 Cox, 330. S. C.; Sherwood v. White, 1 Bro. C. C. 452; Acton v. Mark, 2 Bro C. C. 14; Culley v. Hickling, ib. 182.
(*y*) *Ubi supra.*
(*z*) *Ubi supra.*
(*a*) *Vide* Potts v. Butler, 1 Cox, 330.

Another very salutary regulation of this nature is provided by the 4 Geo. 2, c. 28, s. 3, which enacts, that the lessee or his assignee, or any person claiming under him, shall not have or continue any injunction against the proceeding at law on an ejectment brought by the lessor; unless, within forty days *next after a full and perfect answer filed by such lessor, he [*294] shall bring into Court and lodge with the proper officer such sum as the lessor shall swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor on good security, subject to the decree of the Court.

When the injunction is continued, the cause in equity ought to be prosecuted to a hearing; if it be not, and the Court is satisfied that there is any intentional delay on the part of the plaintiff, the injunction will be dissolved. (*z*) And, by Lord Bacon's 24th ordinance, it is provided, that if no prosecution is had for the space of three terms, the injunction shall fall of itself without further motion. (*a*)

The general course, however, is to move, at the proper time, that the bill may be dismissed for want of prosecution, (*b*) to which motion the circumstance of the injunction having been obtained, either for want of an answer, (*c*) or upon the merits, (*d*) is no objection; nor is shewing cause against dissolving an injunction such a proceeding in the cause as will prevent the dismissal of the bill. (*e*)

We have already seen, (*f*) that if the plaintiff does not set down the cause for hearing in the term after publication has passed, the defendant may apply to set down the cause in the term after that, except in injunction cases, in which the defendant himself is at liberty to set the cause down in the term next after publication passed.

If the answer contains a sufficient defence to the case stated in the bill, the injunction will be dissolved: so where a plea is allowed, there is ordinarily an end of the injunction, but not always; and the Court has said, that an injunction is not absolutely dissolved upon the allowance of the plea, but only *nisi*, because there may be some equity shewn to continue [*295] it. (*g*) It is, however, a matter nearly of course, to dissolve the injunction, after plea allowed, upon motion. (*gg*) Where a cross bill has been filed, if, when the original bill has been answered, the second is not answered in eight days, the injunction will be dissolved. (*h*)

(*z*) Harr. ed. Newl. 548.
(*a*) Beames's Ord. 14.
(*b*) *Ante*, vol. 2, p. 356.
(*c*) Day v. Snee, 3 V. & B. 170.
(*d*) Hannam v. South London Waterworks Company, 2 Mer. 61; Bliss v. Collins, cited ib.
(*e*) Earl of Warwick v. Duke of Beaufort, 1 Cox, 111; *ante*, vol. 2, 367.
(*f*) Vol. 2, p. 604.
(*g*) Prac. Reg. 242.
(*gg*) Philips v. Langhorn, 1 Dick. 148; *ante*, p. 288, *et* vol. 2, p. 225; but where the plea is allowed to stand for an answer, the defendant cannot move to dissolve absolutely, but only *nisi*, *ante* p. 288, *et* vol. 2, p. 220.
(*h*) Hind. 598; Prac. Reg. 235, 241. There is a case in which an injunction was continued, though the answer stated a full defence; there had been a reference to the Master as to title, upon a bill for a specific performance of an agreement and an injunction to restrain the defendant from proceeding at law to recover part of the purchase money paid in advance; the answer stated circumstances which shewed that a decree could not be made on the ground of want of title and outstanding incumbrances: the Court, however, refused to dissolve the injunction, without the Master's report, as it would be in effect deciding the cause. Church v. Legeyt, 1 Pri. 301.

If an injunction be dissolved, yet, if there be cause, it may be revived on motion: (*i*) thus, where a reference of the answer for insufficiency has been shewn for cause against dissolving the injunction, and the plaintiff has been put upon terms of obtaining the Master's report within a certain time, but, having failed to do so, the injunction is dissolved; if the Master afterwards reports the answer insufficient, the plaintiff may move to revive the injunction; (*k*) but, after a reference for *impertinence*, such motion cannot be sustained. (*l*)

The motion has also been refused: where, the Master having reported in favour of the sufficiency of the answer, exceptions have been taken to his report; (*ll*) in like manner it has been refused, where the Master of the Rolls, upon exceptions taken to the Master's report, allowing exceptions for insufficiency, had affirmed them, thinking the answer sufficient, and an appeal had been presented against the judgment. (*m*) The Court also, as we have seen, refused to revive an injunction which had been dissolved, upon the coming in [*296] of an answer denying all the circumstances of the bill, although a true bill *had been found against the defendant for perjury committed in that answer. (*q*)

The effect of an amendment of the bill in dissolving the common injunction, and the method of obviating such effect have been already the subject of discussion. (*r*) So also, has the method of reviving an injunction which has been dissolved, or of procuring an original injunction upon the amendment of the bill. (*s*) It is, however, to be noticed, that since the preceding volumes went to the press, the orders of the 9th of May, 1839, (*t*) have been promulgated, by which it is provided, that the plaintiff, in any injunction cause, having obtained the *common injunction to stay proceedings at law*, may, (either before or after the answer of the defendant shall be put in, and whether such injunction shall or shall not have been continued to the hearing of the cause,) obtain an order, *as of course*, for leave to amend the bill, *without prejudice to the injunction*, but that such order shall contain an undertaking by the plaintiff to amend the bill within one week after the date of the order, and in default thereof the order shall become void; and that, in case the bill shall be amended pursuant to such order, the defendant shall thereupon, and although he may not have put in his answer to the bill or the amendments thereof, be at liberty to move the Court, on notice, to dissolve the injunction on the ground that the bill, as amended, does not, even if the amendments be true, entitle the plaintiff thereto.

By the same orders, (*u*) it is also directed, that in case an injunction to stay proceedings at law shall be prayed for by the bill, and shall either not be obtained, or, having been obtained, shall have been dissolved upon the merits stated in the answer, and the plaintiff shall afterwards amend his bill, and the defendant shall not plead, answer, or demur to the amended bill within eight days after appearance, the plaintiff shall be entitled to move for an injunction, *upon affidavit of the truth of the amendment.*

[*297] It is to be observed that, in the last case, the injunction *granted is special and will be "till answer *or* further order," and that,

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(*i*) Prac. Reg. 242.
(*k*) Dansey v. Browne, 4 Mad. 237; *ante*, vol. 2, 317.
(*l*) *Ante*, vol. 2, p. 299.
(*ll*) *Ante*, vol. 2, p. 318; but if the Court allows the exceptions, the injunction may be revived.
(*m*) Scott v. Mackintosh, 1 V. & B. 504.
(*q*) Clapman v. White, 8 Ves. 35; *ante*, p. 290.
(*r*) *Ante*, vol. 1, p. 526.
(*s*) Ibid. 534.
(*t*) Ord. 9 May, 1839, II.
(*u*) Ibid. Ord. III; *ante*, p. 277.

consequently, the defendant will be allowed to move, *before answer*, to dissolve it, upon affidavit in reply to that upon which the injunction has been granted, (*x*) in which affidavit it seems he may shew, as cause for dissolving the injunction, that the matter introduced by way of amendment was in the knowledge of the plaintiff at the time when he filed his original bill. (*y*)

It seems, however, that if, instead of moving to dissolve the injunction before answer, the defendant waits till he has answered the amended bill, the plaintiff may except to the answer for insufficiency, in which case the Court will not proceed to dissolve the injunction, till the question of the sufficiency of the answer has been decided upon a reference to the Master. (*z*)

SECTION III.

Special Injunctions.

SPECIAL injunctions are those which are granted, not as a matter of course, but upon the special circumstances of the case, whether such circumstances are disclosed by the answer of the defendant or upon affidavits. (*a*)

The granting of special injunctions is discretionary, but they are now granted much more frequently than they were formerly. (*b*) In earlier times they could be obtained upon petition, but several orders have been directed against that practice; and it may now be stated, as a general rule, *that injunctions will not be granted except upon a bill filed for the purpose of specifically praying for an injunction;* nor *against any one who is not a party to the suit.* (*c*) The rule, however, is not universal but is subject to several exceptions; thus if the Court, having full cognizance of the matter, has, by its decree, taken it into its own hands, it will interfere, by its injunction, to prevent [*298] injury to the property, either by the parties litigant or others, although there is no injunction prayed by the bill. Instances of this occur in cases of foreclosure, in which, if after a decree to account, the mortgagor attempts to cut timber, the Court will enjoin him though there was no prayer for an injunction in the bill. (*d*)

Upon the same principle, *if there has been a decree for the administration of assets*, the Court will restrain a creditor, who is not a party to the suit, from proceeding at law against the testator's or intestate's estate for his own individual debt. This it does because it considers the decree it has made in the nature of a judgment for all the creditors, (*e*) and having taken the fund into its own hands it will administer it equitably, and not permit the executor to be pursued at law. It was not until the latter end of the last century that this remedy was given, unless where a bill for an injunction had been expressly filed against the creditor whose action was sought to be restrained; but it then began to be held, that as a decree in equity could not be pleaded at law, (for

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(*x*) Vipan v. Mortlock, 2 Mer. 479. (*y*) Ibid.
(*z*) Ibid. (*a*) *Ante*, p. 275.
(*b*) Potter v. Chapman, Amb. 99; Hanson v. Gardiner, 7 Ves. 307.
(*c*) Prac. Reg. 231; Dawson v. Princeps, 2 Anst. 521; Gadd v. Worrall, ib. 555; Brown v. Frost, 1 Sugd. V. & P. 8th ed. 206.
(*d*) Wright v. Atkyns, 1 V. & B. 313, 314.
(*e*) Martin v. Martin, 1 Ves. 211; Bank of England v. Morice, For. 217, 2 Bro. P. C. 465.

the Courts of Law do not notice a decree in equity,) it was reasonable, in order to save expense, that the executors, when sued, should be able, upon giving notice to the creditor, to bring him in by an order made upon motion. (*f*)

This power is not confined to the executor or administrator only, but the injunction will equally be granted on the application of the heir, (*g*) or of another creditor, (*h*) or of a common legatee, or even, as it seems, of a residuary legatee. (*i*) There is no instance, however, in which a creditor at law has ever been stopped, unless there was a decree under which he could come in; for, until there is such a decree, the creditor ought not to be deprived of the benefit [*299] of a prior judgment; (*k*) *but when the decree has been made, then, from that moment, it must be preferred if it precedes the judgment in point of time, and all the creditors must be paid according to their priorities as they then stand. (*l*)

But although the rule is, that the Court will interfere to give effect to its own decree, yet it will not interfere to protect an executor from any liability to which he may have, personally, subjected himself; wherefore, if he has put in such a plea at law as will entitle the creditor to a judgment *de bonis propriis*, or to a judgment *de bonis testatoris et si non de bonis propriis*, the execution of it will not be restrained. (*m*) What will amount to such a plea, is not easily to be gathered from the cases, but the principles upon which the Court of Chancery acts are fully gone into and explained by Lord Langdale, M. R., in *Lee* v. *Park*, (*n*) and from that it appears, that all pleas, except a general issue or *plene administravit*, would be considered to have that effect.

It is to be remarked that, in one case, where the executors had suffered judgment to go by default, Lord Eldon granted an injunction, considering that an executor's suffering judgment to go default was no more than saying that he was willing to do whatever a Court of Law or Equity might think proper: (*o*) but on another occasion, his Lordship intimated that it is the duty of executors to apply at once for an injunction: for he took it to be clear that if, after a decree to account, the executors should let judgment go by default, or should permit the creditor to proceed at law, they would be responsible; they might indeed be allowed to stand in the place of those creditors against the estate, but they could not do more. (*p*)

It may be observed here, that, as the practice of granting injunctions of this [*300] description might be liable to much abuse, *by a friendly creditor filing a bill and obtaining a decree, it has been laid down as a rule, *that an injunction to restrain a creditor from proceeding at law after decree, shall never be granted without an affidavit from the executor as to what assets he has in his hands.* (*q*) The rule, however, is liable to exception where the assets are stated, or the balance is set forth in his answer, (*r*) so as to enable a motion for the payment of it into Court to be made, and then the injunction will be granted upon the terms of the executors bringing the money into Court,

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(*f*) Paxton v. Douglas, 8 Ves. 520. (*g*) Martin v. Martin, *ubi supra.*

(*h*) Dyer v. Kearsley, 2 Mer. 482 n.

(*i*) Brooks v. Reynolds, 1 Bro. C. C. 183; 2 Swanst. 545; and see Clarke v. the Earl of Ormonde, Jac. 122.

(*k*) Rush v. Higgs, 4 Ves. 637; and see Perry v. Phelips, 10 Ves. 34; Ca. t. Talbot, 22.

(*l*) Largan v. Bowen, 1 Sch. & Lef. 296; Lee v. Park, 1 Keen. 724.

(*m*) Terrewest v. Featherby, 2 Mer. 480; Clarke v. Earl of Ormonde, Jac. 108; Lord v. Wormleighton, ib. 148; Price v. Evans, 4 Sim. 514; Kent v. Pickering, 5 Sim. 569.

(*n*) 1 Keen. 714. (*o*) Dyer v. Kearsley, 2 Mer. 482 n.

(*p*) Clarke v. Earl of Ormonde, *ubi supra.* (*q*) Cleverly v. Cleverly, cited 8 Ves. 521.

(*r*) Gilpin v. Lady Southampton, 18 Ves. 469.

which will make such order as the state of the assets require. (*s*) It is right to state, in this place, that a creditor, who is restrained by an injunction of this nature, is entitled to his costs at law, up to the time when he first had notice of the decree, (*t*) but not to the costs subsequently incurred, nor to the costs of the motion. (*u*) It appears to have been stated by the Registrar, in *Drewry* v. *Machen*, (*x*) to be the usual form to direct the injunction to issue "on payment of costs;" but Lord Eldon said, this was improper; and it seems that, in such cases, the costs of the creditor, up to the time when he had notice of the decree, should be proved as a debt under the decree. (*y*)

It is to be remarked that this injunction, when granted, is a *special injunction* which restrains the creditor in general terms, not merely from suing on to execution, but from all further proceedings in the action he has brought. (*z*)

The second occasion in which an injunction will be granted without a bill being filed for the express purpose, is where a plaintiff is proceeding against the defendant, both at law and in equity, at the same time, and for the same matter; in such cases, as we shall see hereafter, the defendant has a right, upon putting in his answer to the bill in Chancery, to call upon the plaintiff to elect in which Court he will proceed, and then, if the plaintiff elects to proceed in equity, the Court will interfere, by *injunction, to restrain him from further proceeding at law. (*u*) [*301]

Another class of cases in which an injunction may be obtained without a bill being filed for that purpose, has been already pointed out as proceeding from the jealousy entertained by the Court of any interference with its process by any other tribunal, for which reason the Court will, as we have seen, issue its injunction to restrain an action at law to recover damages for false imprisonment under process of contempt improperly issued. (*x*)

With the exceptions above enumerated, the rule is invariable that, *before the Court will issue an injunction, a bill must be filed, of which bill a prayer for an injunction must form a part;* for, notwithstanding the boasted efficacy of the prayer for general relief, it has, as we have already seen, been determined that an injunction cannot be obtained under that prayer alone. (*y*)

The various cases in which this Court will interfere by injunction, are almost as numerous as the matters which fall within the equitable jurisdiction of the Court of Chancery; for, whenever a plaintiff is entitled to equitable relief, then, if that relief consists in restraining the commission or continuance of some act of the defendant the Court will injoin him by means of this prohibitory writ. There are some cases, however, in which an injunction will not be granted, and the consideration of these, in the first place, will clear the way before us for the fuller investigation of the subject.

It is an established rule, that the Courts will grant no injunction, or order in the nature of an injunction, *to stay proceedings in any criminal matter*, "If they did," said Chief Justice Holt, "the Court of Queen's Bench would

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(*s*) Ibid.

(*t*) Paxton v. Douglas, 8 Ves. 521; Jackson v. Leaf, 1 J. & W. 231.

(*u*) Cune v. Bowyer, 3 Mad. 456; Anon. 2 S. & S. 424.

(*x*) 3 Swanst. 541.

(*y*) Goate v. Fryer, 2 Cox, 202; 3 Bro. C. C. 24.

(*z*) Goate v. Fryer, 3 Bro. C. C. 23; Kenyon v. Worthington, 2 Dick. 668; Fenton v. Corral, Seton on Decrees, 302.

(*u*) *Vide post*, "of Election." (*x*) *Vide ante*, vol. 1, p. 665.

(*y*) *Ante*, vol. 1, p. 502. It is to be observed, that although a prayer for an injunction in the prayer for process, will be sufficient, though not mentioned in the special prayer, yet if the bill prays for the injunction in the prayer for relief, it must do it also in the prayer for process. Wood v. Beadell, 3 Sim. 273.

[*302] break it, and protect any that would proceed in contempt of it." (z) *Accordingly, in the case of *Lord Montague* v. *Dudman*, (a) Lord Hardwicke allowed a demurrer to a bill for an injunction to stay proceedings on a *mandamus* issued to compel the Lord of a Manor to hold a Court. "The Court," he said, "has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*, or on an indictment, or an information, or a writ of prohibition." But this restriction applies only to cases where the parties seeking redress by such proceedings are not the plaintiffs in equity, for, if they are, then they are subject to control by an order personally affecting them; for when parties have submitted their rights to the Court, then the Court has certainly a jurisdiction, and it may interfere. If, for instance, a suit were to be instituted to establish a right to land where entries have been made, and the bill should seek to quiet the possession, and after filing the bill the plaintiff should prefer an indictment for a forcible entry, which is of a double nature, as it partakes of a breach of the peace and is also a civil right, "the Court," said Lord Hardwicke, "would certainly stop the proceedings upon such an indictment." Upon this principle his Lordship acted, in *the Mayor of York* v. *Pilkington*, (b) where a bill had been filed to establish a right of fishing, and the plaintiffs in the first cause indicted the agents of the defendants for a breach of the peace in fishing; there an injunction was granted with reference to what was civilly in question between the parties, though it was also the subject of a criminal prosecution, for while the question of right was depending in equity, it was but reasonable that the plaintiff should not proceed by action or indictment until it was determined there. (c)

It is now, also, settled that there is no jurisdiction in a Court of Equity whereby an injunction may be obtained to stay the process of a Court of Law

[*303] upon an award *which has been made a rule of Court under the Statute 9 & 10 Wm. 3, c. 15. By that statute it is declared, "*that the process of the Court, in which the submission is made a rule, shall not be stopped or delayed in its execution by any order, rule, command, or process of any other Court, either of law or equity, unless it shall be made to appear, on oath, to such Court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage, was procured by corruption or other undue means;*" and it has therefore been held, that no Court has jurisdiction to set aside an award under that statute, except the Court in which the submission has been made a rule.

It is to be observed, that, by the second section of the above statute, it is provided, "*that any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of Law or Equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage before the last day of the term next after such arbitration made and published to the parties.*" Under this section it was contended, that though the application to the Court in which the reference is made a rule must take place within the time limited, there is no limitation of time to an application to any other Court, and that the jurisdiction of the Court of Chancery, notwithstanding the act, remained after the time given by the statute expired; but Lord Eldon's opinion was, that in cases where the

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(z) Holdernesse v. Saunders, 6 Mod. 19. (a) 2 Ves. 396.

(b) 2 Atk. 302; see 2 Ves. 398; and see Atty. Gen. v. Cleaver, 18 Ves. 220.

(c) These cases do not interfere with the well established rule that the Court of Chancery has originally no jurisdiction to injoin or regulate any criminal proceedings; but when the injunction is granted, it is merely incidental to the ordinary power which it ought to have of imposing terms upon the parties who seek its aid in furtherance of their rights.

reference had been made a rule of another Court under the statute, the jurisdiction of this Court was ousted. (*d*)

In the case above referred to, the reference to arbitration had been made a rule of Court before the injunction was applied for; but, in *Dawson* v. *Sadler*, (*e*) the same principle was acted upon by Sir J. Leach, V. C., where the bill had been actually filed before the reference had been made a rule of Court, and notice of motion had been given for an injunction to restrain [*304] *the defendant from making it a rule of another Court, but the defendant succeeded in getting the rule made before the motion came on. In *Nichols* v. *Roe*, (*f*) however, Sir L. Shadwell, V. C., held, upon demurrer, that where the reference had not been made a rule of Court before the bill filed, the jurisdiction of the Court was not taken away; and, upon a subsequent application to dissolve an injunction, which the plaintiff procured to restrain the defendant from taking proceedings upon a rule which he had afterwards obtained, his Honor refused to dissolve it; but, upon appeal, an order to dissolve the injunction was made, by Lord Brougham, after an elaborate analysis of the statute, on the ground that no Court, except the Court in which the submission is to be made a rule, has the power of reviewing the award, and that it makes no difference whether that submission is so made a rule before or after the bill is filed. (*g*)

An injunction will not lie to relieve the plaintiff against a judgment at law, where the case in equity proceeds upon a ground which was equally available at law, unless the plaintiff can establish some special equitable ground for the relief which he asks; accordingly it was held, in *Harrison* v. *Nettleship*, (*h*) that a plaintiff in equity who had pleaded a set-off in an action at law and failed, could not sustain a bill for an account relating to the same transaction as to which he had pleaded the set-off. But if a defence could not have been made available in the Court of Law at the same time or under the circumstances, and there was no *laches* in the party applying, then relief will be granted, and the Court of Chancery will interfere by its injunction. (*i*) So also if a fact, material to the merits, which would render the proceedings upon the judgment inequitable, should be discovered after a trial, which could not, by ordinary diligence, have been ascertained before relief will be granted. (*k*)

These, however, are mere exceptions to the general rule, for [*305] *the general rule most undoubtedly is, that *equity will not relieve after a verdict where the defendant at law might properly have defended himself there;* (*m*) for Courts of Equity, like Courts of Law, require due and reasonable diligence from all parties to a suit; and, if a matter has been properly investigated in a Court of Common Law, according to the common and ordinary rules of investigation there, then a Court of Equity cannot take on itself to enter into it again. Therefore if the defendant in an action at law submits to go to trial without filing a bill in equity for discovery of evidence, and, after verdict against him, attempts to gain that discovery as a ground for a new trial, with an injunction in the meantime, or, if the facts on which the bill is founded, though discovered since the trial, might have been established at the trial by the cross-examination of a witness, and the party was put upon inquiry;—in either

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(*d*) Gwinett v. Bannister, 14 Ves. 530. (*e*) 1 S. & S. 537.
(*f*) 5 Sim. 156.
(*g*) Nichols v. Roe, 3 M. &. K. 431; *vide etiam* Davies v. Getty, 1 S. & S. 411; and Dawson v. Sadler, *ubi supra*.
(*h*) 2 M. & K. 423. (*i*) Farquharson v. Pitcher, 2 Russ. 81.
(*k*) Jarvis v. Chandler, 1 T. & R. 319.
(*m*) Protheroe v. Forman, 2 Swanst. 229; and see Countess of Gainsborough v. Gifford, 2 P. Wms. 424.

of these cases the Court of Chancery will not give countenance to such a proceeding, for the inattention of parties in a Court of Law can hardly be made the subject of interference in a Court of Equity. (*n*) There may, however, be cases cognizable at law and also in equity, in which equity will sometimes interfere, after matter has been determined in a Court of Law; for instance in a case of complicated account, where the party has not made a defence, because it was impossible for him to do it effectually at law, or where a verdict has been obtained by fraud, (*nn*) or where a party has possessed himself improperly of something by means of which he has acquired an unconscientious advantage which equity will either put out of the way or restrain him from using.

Excepting, however, in the cases above put, or in cases of the like nature, an injunction will not be granted where the cause has already been decided by the proper tribunal, (*o*) therefore a Court of Equity will not relieve by granting
[*306] an injunction and staying execution on a judgment, because there has been *a mistake in the pleading, or in the conduct of the cause, (*p*) or merely to let in new corroberative evidence, for the jurisdiction does not arise from the circumstance that a party has omitted to make a proper defence. (*q*)

It is to be observed here, that an important distinction has frequently been attempted to be drawn between an error or mistake in fact, and an error or mistake in law. With respect to the former, it has been clearly settled, that, where a deed has been executed, or money paid, from ignorance of a fact, or under an erroneous impression respecting it, a Court of Equity will relieve; but there seems to have been some difference upon the question whether it would do so when an act has been done under a mistake of law. (*r*) With regard to the cases on this head, in which relief has been given, some of them are attended with circumstances of fraud or circumvention, and others of them lie so much on the borders of the two kinds of errors, that they are to be classed amongst instances of errors of fact rather than errors of law; but, in *Pullen* v. *Ready*, (*s*) Lord Hardwicke intimated, that, if parties are entering into an agreement, and have the facts before them, and their counsel choose to construe it, taking upon themselves the knowledge of the law, he would then hold them bound. Lord Eldon has quoted this passage with evident approbation, and, whatever may be the rule generally as to other parties, yet, in family arrangements, it seems to be settled that they will not be disturbed, after a long acquiescence, on the ground that they are founded on a mistake of the parties, or because, in the result, they may turn out to be more advantageous to one party than the other. We may, therefore, infer, from these cases, that an injunction will not be granted to stay any legal proceedings on the ground that the deed or instrument upon which an
[*307] action *was brought was made under a mistake in point of law, (*t*) for *ignorantia juris non excusat.*

(*n*) Id. Red. 132; Sewell v. Freeston, 1 Ch. Ca. 65; Taylor v. Sheppard, 1 Y. & C. 271; Hankey v. Vernon, 2 Cox. 12.

(*nn*) Isaac v. Humpage, 1 Ves. Jr. 427; 3 Bro. C. C. 463, S. C.

(*o*) Bateman v. Willoe, 1 Sch. & Lef. 204.

(*p*) Stephenson v. Wilson, 2 Vern. 325; Blackhall v. Combs, 2 P. Wms. 70; Kemp v. Mackrell, 2 Ves. 579; Holworthy v. Mortlock, 1 Cox. 141.

(*q*) Ware v. Horwood, 14 Ves. 31.

(*r*) Pusey v. Sir Edw. Desbouvrie, 3 P. Wms. 315; Broderick v. Broderick, 1 P. Wms. 239; Cocking v. Pratt, 1 Ves. 400; Ramsden v. Hylton, 2 Ves. 304; Bingham v. Bingham, 1 Ves. 126.

(*s*) 2 Atk. 591; cited 1 V. & B. 30.

(*t*) Stockley v. Stockley, 1 V. & B. 23; Clifton v. Cockburn, 3 M. & K. 76; Neale v. Neale, 1 Keen. 672.

Having pointed out some of the instances in which the Court will *not* interfere by injunction, we will now proceed to the consideration of the cases in which it will exercise that branch of its jurisdiction.

The various instances in which an injunction will be granted are almost as numerous as the matters which fall within the equitable jurisdiction of the Court of Chancery, for, whenever a plaintiff is entitled to equitable relief, then, if that relief consists in restraining the continuance or commission of some act, the Court will injoin it, by means of this prohibitory writ; it will be impossible, therefore, in a Treatise of this nature, to accomplish more than to enumerate, very briefly, the principal purposes for which injunctions will be granted, before we proceed to discuss the different points of practice with regard to them.

Injunctions may be obtained to stay proceedings in other Courts of Justice, whether such Courts are Courts of Law, or Equity, or whether they are the Spiritual Courts, or the Courts of Admiralty, and even, in some instances, although the Courts may actually be situated in a foreign country.

It is a general rule, illustrated by an abundance of cases, that wherever a party, by fraud, accident, mistake, or otherwise, has obtained an advantage in proceeding in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of Equity will interfere to prevent a manifest wrong, by restraining the party whose conscience is thus bound, from using the advantage he has there gained; thus if by fraud, accident, or mistake, a deed is framed contrary to, or beyond the intention of the parties in their contract on the subject, and the forms of the Courts of Common Law will not admit of such an investigation as will enable them to do justice, the Court of Chancery will restrain the party from asserting his legal rights under the instrument *in those points in which it is so framed, until it [*308] has investigated the question; when, if the complaint be well founded, it will either rectify the instrument in the points complained of, or permanently restrict the party from making use of it. (*u*) There are also many other cases in which the legal defence to a claim set up at law, rests either exclusively or in a great degree within the knowledge of the party advancing the claim, by which means that defence can only be obtained through the assistance of a Court of Equity: as it is, therefore, against conscience that the party should proceed in the assertion of his claims without communicating the information he possesses, it has become one of the most ordinary modes of equitable interposition to afford relief, by injunction, until the discovery is obtained; for, if a person were permitted to go on at law and insist on a trial, before the discovery was obtained, it is obvious that the law might become an instrument of the grossest injustice. (*x*)

Fraud, accident, mistake, and discovery, are, therefore, four of the principal grounds upon which injunctions may be applied for to stay proceedings at law. And it is to be observed, that an injunction to restrain proceedings at law, when awarded, does not deny but admit the jurisdiction of the Courts of Common Law; and the ground upon which it issues is, that they are making use of their jurisdiction contrary to equity and good conscience. (*y*)

It is also to be observed, that, in cases of this description, the injunction is not confined to any one point of the proceedings at law; but, upon a proper case being presented to the Court, it may be granted at any stage of the action: thus an injunction is sometimes granted to stay trial; (*z*) sometimes when the

(*u*) See Ld. Red. 103; Eden on Injunctions, p. 4 to 14.
(*x*) The cases on this subject are collected in Eden on Injunctions, p. 17.
(*y*) Hill v. Turner, 1 Atk. 516; and see what is said in 1 Atkins, 630.
(*z*) Codd v. Wooden, 3 Bro. C. C. 73; Lady Arundell v. Phipps, 10 Ves. 144; Rowe v. Wood, 2 Swanst. 234; Prac. Reg. 250.

parties are in a condition to *enter up judgment* to restrain their so doing; (*a*) sometimes they are issued after a judgment *to stay execution*, or *proceedings under an execution;* [*309] *sometimes after execution to stay the money in the hands of the Sheriff, if it be a case of *fieri facias*, or to stay the delivery of possession, if it be a *writ of possession;* (*b*) but it is to be remembered that, after a judgment, an injunction will not be granted, except in those cases where there has been fraud or collusion in obtaining a verdict, or where the party has been unable to defend himself effectually at law, without any fault or negligence of his own; or where the plaintiff has possessed himself of something by means of which he has obtained an unconscientious advantage; in short, the Courts are unwilling to interfere when it appears that the plaintiff has lain by until after a trial has taken place. (*bb*)

Injunctions will also be granted, by the Court of Chancery, to stay proceedings in other Courts of Justice, as well as to stay proceedings in the Courts of Common Law; and it sometimes grants them when the Court which it enjoins has an original jurisdiction concurrently with itself. Ordinarily, when two Courts have a concurrent jurisdiction over the same thing, whichever Court was first possessed of the cause has a right to proceed with it, and it cannot be prohibited or restrained by any other; (*c*) but there are some subjects which are only proper for the cognizance of the Court of Chancery, and, upon those subjects, this Court will always interfere; therefore, wherever there is a trust, or any thing in the nature of a trust, it will stop the prosecution of a suit in the Ecclesiastical Courts for the payment of a legacy, notwithstanding those Courts have an original jurisdiction with regard to legacies: (*d*) accordingly it has interfered in this way, in cases where the bequest of a legacy involves the execution of trusts express or implied, or where the trusts in the bequests are themselves to be pointed out by the Court; for the construction of trusts and the execution of trusts cannot be enforced by the Spiritual Courts any more than they can be enforced by the Courts of Common Law. (*e*) It has also interfered in this way, when a father is suing for a *legacy [*310] bequeathed to an infant child; for the Court of Chancery can give proper directions for securing and improving the fund, which the Spiritual Courts are unable to do. (*f*) It has also interposed where a legacy has been given to a married woman, and the husband has instituted a suit for it in the Spiritual Courts; because those Courts have no authority to require him to make a suitable provision for the wife and her family as a Court of Equity has; and, therefore, to allow such suit to proceed would enable the husband to do an injustice to her rights and to defeat the equity to a settlement. (*g*) And so, although the Ecclesiastical Court is the proper jurisdiction to determine the validity of a will of personal estate, yet if the will comes into Chancery on an incident in the cause, and that incident or the will itself is admitted by the parties, it has been decided that the Court will hold the parties to be bound by such admission, and, if either of them should bring a new suit to contest that determination, it will grant an injunction to restrain them. (*h*)

(*a*) Turner v. Wright, 1 J. & W. 290.
(*b*) Woodeson's Lect. 406, 407, and Eden on Inj. 44.
(*bb*) *Ante*, p. 305.
(*c*) Nicholas v. Nicholas, Prec. in Ch. 547.
(*d*) Anon. 1. Atk. 491.
(*e*) Stonehouse v. Stonehouse, 1 Dick. 98; Smith v. Kempson, 2 Dick. 769.
(*f*) Nicholas v. Nicholas, *ubi supra;* Rotheram v. Fanshaw, 3 Atk. 629; Harrell v. Waldron, 1 Vern. 26.
(*g*) Tanfield v. Davenport, Toth. 114; Meals v. Meals, 1 Dick. 373.
(*h*) Sheffield v. the Dutchess of Buckinghamshire, 1 Atk. 628; Gasscoigne v. Chandler, 3 Swanst. 418 n.

An injunction to stay proceedings in the Admiralty Court, in a suit for the condemnation of a ship, has been refused, when it appeared that the Court of Admiralty, by its own rules, had as large an authority as the Court of Chancery, to put the subject into a method of inquiry, and to act upon that inquiry by giving the same relief; (*i*) but if the proceedings in the Admiralty Court are in that stage in which no new evidence can be received, as—if a sentence has been obtained and an important fact has since been discovered, the Court of Chancery, will restrain proceedings to enforce that sentence, considering it in the same light as if there had been a trial at law and a verdict obtained, which may be affected in equity by subsequent discovery. (*k*)

It may be mentioned here, that although this Court does not in general interfere with proceedings in the Court of Bankruptcy, *which as constituted by the 1 and 2 W. 4, c. 56, is a Court of Equity as well [*311] as of Law, and therefore capable of doing justice between the parties in matters of equity; yet it seems, that it will interfere to restrain proceedings the effect of which may be to afford a foundation for a *fiat* in bankruptcy, in a case where such a proceeding would be contrary to equity. Upon this principle the Master of the Rolls, in a recent case, issued an injunction to restrain a party from taking proceedings under the Insolvent Debtors' Act, (1 & 2 Vict. c. 110, s. 8,) by means of which an act of bankruptcy might have been deemed to have been committed by the plaintiff, or *fiat* awarded against him. (*l*)

With regard to foreign Courts, there has been much doubt and difference of opinion: soon after the restoration, when the Court of Chancery was in its infancy, Lord Clarendon refused an injunction to restrain proceedings at Leghorn, after advising with the other Judges; but the reporter adds "*sed quære*, for all the bar was of another opinion." (*ll*) This case has not been recognized or followed in later times, and several authorities may be found in the books where decrees and orders have been made to restrain defendants from carrying on proceedings under such actions, in Iredand, (*m*) Scotland, (*n*) Demerara, (*o*) and other countries. In granting such an injunction, however, the Court does not presume to direct or control the Courts; but, without respect to the subject matter of dispute, it considers the equities between the parties, and decrees *in personam* according to those equities.—The jurisdiction is not grounded upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the party, upon whom the order is made, being within the power of the Court; for if the Court, as in *Pen* v. *Lord Baltimore*, (*p*) can *decree the performance of an agreement touching the boundary [*312] of a province in North America, or, as in *Toller v. Carteret*, (*q*) can foreclose a mortgage in the Isle of Sark, or one of the Channel Islands, in like manner it can restrain the party, being within the limits of its jurisdiction, from doing any thing abroad, whether the act forbidden be a conveyance or other act *in pais*, or the instituting or prosecuting of an action in a Foreign Court. (*r*) And if a defendant, who is thus ordered to discontinue a proceed-

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(*i*) Anon. 3 Atk. 350. (*k*) Jarvis v. Chandler, T. & R. 319.

(*l*) Attwood v. Banks, 2 Beav. 192.

(*ll*) Love v. Baker, 1 Ch. Ca. 67; reported as Lowe v. Baker, Freem. 125.

(*m*) Clarke v. Ormonde, Jac. 546; Booth v. Leycester, 1 Keen. 579; Harrison v. Gurney, 2 J. & W. 563.

(*n*) Kennedy v. Earl of Cassillis, 2 Swanst. 313; see Wharton v. May, 5 Ves. 71; Bushby v. Munday, 5 Mad. 297; Marquess of Breadalbane v. Marquess of Chandos, 2 M. & C. 711.

(*o*) Bunbury v. Bunbury, 1 Beav. 318; Beckford v. Kemble, 1 S. & S. 7.

(*p*) 1 Ves. 444. (*q*) 2 Vern. 494.

(*r*) Ld. Portarlington v. Soulby, 3 M. & K. 104.

ing which he has commenced against the plaintiff in a Foreign Court, should think fit to disobey the order, and continue the prosecution of such proceedings, the Court of Chancery, although it does not pretend to control or intermeddle with the independent jurisdiction which the other Court undoubtedly possesses, will act upon the person of the defendant by punishing him for his contempt; and if he should continue contumacious, and ultimately obtain a judgment in the other Court, it will protect the plaintiff against the consequences of that judgment. (*s*)

In this view of the case, as the doctrine is now established, the only question is, whether the ends of justice require that the Court of Chancery should interfere. This must depend upon special circumstances, such as whether the Court of Chancery has better means of determining both the law and the facts of the case, as it had in *Bushby* v. *Munday*; (*t*) or when two suits are instituted for the same matter, in all respects, and there has been a decree and adjudication in this country, as there were in *Bunbury* v. *Bunbury*; (*u*) or where there are questions in the cause, as in *Booth* v. *Leycester*, (*uu*) which must be decided according to the principles of equity before it can appear whether the parties have a clear equitable as well as legal title to the rights which they claim abroad.

The next head proposed for consideration, in which an injunction will be [*313] granted, is, when it becomes necessary *to prevent *waste or any thing in the nature of waste.* The inadequacy of the remedy at common law, as well to prevent as to give redress for waste, is so unquestionable, that a resort to the Courts of Law, for either of those purposes, has in a great measure fallen into disuse. The remedy by a bill in equity is much more easy, expeditious, and complete; for relief will be given in equity, where the remedies provided in the Courts of Common Law could not be made to apply; as where the titles of the parties are of a purely equitable nature, or where the parties have both legal titles and legal remedies, but irreparable mischief would be done, unless they were entitled to more immediate relief than that which they could obtain at law, or where the parties committing the waste, with nothing but temporary and limited interests in the subject matter, are maliciously and wontonly abusing those legal rights to the injury of those in remainder.

The most ordinary instance of the interposition of a Court of Equity, is by injunction to restrain the commission of waste by a tenant for life or years upon the application of the reversioner or remainder man, for an estate for life is always impeachable for waste, unless the contrary is pointed out by express limitation. (*x*) To redress this wrong, the only common law remedies are—either an action of waste, or an action on the case in the nature of waste: the first of these remedies is given by the statutes of Marlbridge and Gloucester, (*y*) which, taken together, enabled the owner of the inheritance to recover the place wasted, together with treble damages as an equivalent for the safety done to him. No person, however, could bring this action but he who had the immediate estate of inheritance expectant on the determination of the estate for life; (*z*) consequently, the remedy provided by these statutes was inapplicable to a vast variety of cases, and it therefore gave way to the second of these remedies, *i. e.*, to the action on the case, which might be brought by the person in reversion, or remainder for life or years, as well as by a reversioner, &c. in fee; (*a*) but

(*s*) Bushby v. Munday, 5 Mad. 297.
(*t*) *Ubi supra.*
(*u*) 1 Beav. 318.
(*uu*) 1 Keen, 579.
(*x*) Cole v. Peyson, Ch. Rep. 57.
(*y*) 52 H. 3, c. 23; and 6 E. 1, c. 5.
(*z*) 1 Inst. 53 b. and 218 b. n. 2; Paget's case, Rep. p. 5, 76. b.
(*a*) Williams's Saunders, 252, n. 7.

as it *has been determined that an action on the case will not lie for *permissive waste*, (*b*) and as it is certain that it can not prevent [*314] the commission of *future waste*, an injunction in equity, with its consequential account, is, in ordinary circumstances, the most usual and most efficacious mode of obtaining complete redress. It is true that the common law had one remedy of a preventive nature, in the *writ of estressment*, but that remedy could only be obtained during the pendency of a real action; and so when the proceeding by ejectment became the usual mode of trying a title to land, in which case the writ of *estressment* did not apply, Courts of Equity, proceeding on the same principles, supplied the defect and extended it to other cases where the waste was only threatened. (*c*)

It is obvious, from the foregoing summary of the common law remedies, that, even if the common law remedy were more efficacious than it is, there are many persons who would be without redress if the Court of Equity did not interfere,—such as children unborn, and persons having contingent or executory interests. Injunctions will accordingly be granted to protect the interests of a child *in ventre sa mere*, (*d*) of a contingent remainder man, (*e*) or of an executory devisee; (*f*) for if this protection were not given, it would be very easy to destroy the intention, as to timber, in almost every settlement, whether by deed or will. There are also other cases where a person is dispunishable at common law for committing waste, and yet a Court of Equity will enjoin him: thus, it is clear, that where there is a tenant for life, with remainder to another for life, with remainder over in tail or in fee, and the first tenant for life commits waste, the remainder man in tail or in fee can have no action of waste,—the reason of which is, that the plaintiff in the action must recover the place wasted; and that would be an injustice to the remainder man for life, whose estate *is not forfeited, and if it should be recovered by the owner [*315] of the inheritance, (being under the limitation of the property,) it would never go back again. But though the law allows no action of waste, in such a case, yet the Court of Chancery will sustain an injunction, (*ff*) and this *ab antiquo*, according to the case in Moore, 554, where Lord Ellesmere said he had seen a precedent for it so long ago as in the reign of Richard the Second. (*g*) And not only will the Court of Chancery grant the injunction upon the application of the remainder man in fee, but it will also grant it upon the application of the *mesne* remainder man for life; for though he has no right to the timber, yet if the first tenant for life should die, he would have an interest in the mast and shade. (*gg*) It is upon the like principle, also, that Lord Hardwicke granted an injunction at the suit of a ground landlord, to stay waste in an under lessee; (*h*) and an injunction has also been obtained against a tenant from year to year, after a notice to quit, to restrain him from taking away the crops or sowing the land with a pernicious seed, in a manner which was contrary to the usual course of husbandry. (*i*)

(*b*) Herne v. Bembow, 4 Taunt. 764.

(*c*) Ld. Red. 136; Gibson v. Smith, 2 Atk. 183; for the best accounts of the common law remedies, see Jefferson v. Bishop of Durham, 1 Bos. & Pull. 120.

(*d*) Robinson v. Litton, 3 Atk. 211; Lutrell's case, cited Prec. in Ch. 50.

(*e*) Williams v. Duke of Bolton, 3 P. Wm. 268, n.

(*f*) Hayward v. Stillingfleet, 1 Atk. 425; Robinson v. Litton, 3 Atk. 209; and see Stansfield v. Habergham, 10 Ves. 273.

(*ff*) Boswell's case, 1 Rolls. Ab. 377; Tracy v. Tracy, 1 Vern. 23; Abraham v. Bubb, Freem. 53.

(*g*) Garth v. Cotton, 1 Dick. 205, 208.

(*gg*) Dayrell v. Champness, 1 Eq. Ca. Ab. 400; Mollineux v. Powell, 3 P. Wm. 268 n.; Perrot v. Perrot, 3 Atk. 94; Davis v. Leo, 6 Ves. 787.

(*h*) Farrant v. Lovell, 3 Atk. 723, Amb. 105, S. C. sub nom. Farrant v. Lee.

(*i*) Onslow v. ———, 16 Ves. 173; Pratt v. Brett, 2 Mad. 62.

A Court of Equity will also restrain waste where the titles of the parties are of a purely equitable nature: thus, in the case of mortgages, if the mortgagor in possession should attempt to cut down timber, and the land without the timber is an insufficient or scanty security, a Court of Equity will restrain him; for, as the whole estate is a security for the money advanced, the mortgagor, under such circumstances, ought not to be suffered to lessen or diminish it: (*k*) and so it is the duty of trustees who are appointed to preserve contingent remainders, to protect the entire inheritance for the benefit of all *the cestui que* [*316] *trusts* in remainder, whether vested or contingent; and as, in many instances, the value of that inheritance consists as much of the mines and timber as it does of the land, they may, by force of their trust, have their remedy by injunction, to prevent the destruction of the one or the exhaustion of the other. (*l*) Under this head, we may also class those cases where persons are contracting for leases and other interests in property which they are only in possession of by virtue of the contract; in such cases, if the plaintiff has no legal title, he has no redress at law, but if he has such a contract as will authorize him to call upon the Court to clothe the possession with the legal title, and the answer admits such contract, the injunction will be granted. (*m*)

An injunction will also be granted, in some cases, where the parties have both legal titles and legal remedies, but irreparable mischief would be done unless they were entitled to more immediate relief than that which they would obtain at law; it has accordingly been granted where the injunction amounted in fact to an injunction to stop a trespass: for if the Court would not interfere against a trespasser, he might go on by repeated acts of damage which would be absolutely irremediable. The original distinction was, that if a person still living committed a trespass, by cutting timber or taking lead ore or digging for coal, the Court would not interfere, except so far as to give a discovery, and then an action might be brought for the value discovered; but if the person died, then, since the trespass died with him, the Court has said it would decree an account, though the law provided no remedy. Throughout Lord Hardwicke's time and down to that of Lord Thurlow, the distinction between waste and trespass was thus acknowledged; (*n*) Lord Thurlow himself acted upon the same principle, saying, that the person to be enjoined was a mere stranger, and he ought to be turned out of possession immediately. (*o*) Then came *Flamang's* case: (*p*) [*317] there a landlord *of two adjoining closes let one of them to a tenant who took coal out of one close, and also out of the other which was not demised to him; and it was held, at first, that the taking the coal out of the former, as waste, would be restrained, but as to the close which was not demised to him, it was a mere trespass, and the Court could not interfere; but Lord Thurlow afterwards changed his opinion, on the ground that irreparable mischief would follow his refusal, holding in effect that if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not the only remedy to which in equity he was entitled. The same principle has been acted on, and applied without scruple, in various other decisions, for unless there was a jurisdiction to prevent destruction or irreparable mischief, there would be a great failure of justice in this country. (*q*)

(*k*) Usborne v. Usborne, 1 Dick. 75; Hippesley v. Spencer, 5 Mad. 422; Humphreys v. Harrison, 1 J. & W. 581.

(*l*) Garth v. Cotton, 1 Dick. 183; Stansfield v. Habergham, 10 Ves. 273.

(*m*) Norway v. Rowe, 19 Ves. 155. (*n*) Thomas v. Oakley, 18 Ves. 186.

(*o*) Mortimer v. Cottrell, 2 Cox, 205.

(*p*) Cited or referred to 6 Ves. 147; 7 Ves. 308; 15 Ves. 138; 18 Ves. 186.

(*q*) Mitchell v. Dors, 6 Ves. 147; Crockford v. Alexander, 15 Ves. 138; Thomas v. Oakley, 18 Ves. 186.

The Court will likewise interfere by injunction, where the parties committing the waste, with nothing but temporary and limited interests in the subject matter, are maliciously and wantonly abusing their legal rights to the injury of those in remainder; this is commonly called *equitable waste*, which may be defined to be—*the commission of such acts as at law would not be esteemed, under the circumstances of the case, to be waste, but which are so esteemed in the view of a Court of Equity, from their manifest injury to the inheritance, though not inconsistent with the legal rights of the party committing them.* Thus, for example, it was held, in *Lewis Bowles's* case, (*q*) that if there be a tenant for life without impeachment of waste, he had as great a power to do waste, and to convert it at his own pleasure, as a tenant in fee or a tenant in tail had, so that if any trees were severed from the inheritance, either by the act of the party or by the act of law, and became chattels, the whole property in them was in the tenant for life, by force of the said clause. The necessary consequence of this doctrine was, that a tenant for life without impeachment of waste, could not in any case be restrained, in equity, from cutting timber upon the estate, *for that would have been to determine that he should not enjoy the property which the law gave him. (*r*) It was, however, soon found, that this extensive power might be wantonly and capriciously abused to the prejudice of the inheritance, and accordingly, where a tenant for life, unimpeachable of waste, was making an unconscientious use of that power, the Courts of Equity assumed the jurisdiction of restraining and modelling it. Thus it has interfered by injunction where the tenant for life was pulling down a *castle*, (*s*) or the *family mansion*, or *farm houses*. (*t*) It will also interfere where he is cutting down timber of too young growth, (*u*) or where he is cutting down trees which were planted or growing, or designedly left, for ornament or shelter. (*x*) This principle has even been extended to plantations, vistas, avenues, and rides, (*y*) and to trees which are either planted to shut out an object, (*z*) or merely for the benefit of a view. (*a*) In some of these cases, the kind of waste had been called, by the Judges, *extravagant, humoursome waste:* in others, as *voluntary, malicious, intended waste;* in others again as *wanton and wilful waste;* in all of them, in short, it was the improper and abusive exercise of a legal power to the detriment of those in remainder. [*318]

Tenants in tail, after the possibility of issue extinct, have the same powers and are subject to the same restrictions as tenants for life without impeachment of waste; and it makes no difference that they are unimpeachable of waste, not by the provision of the grantor, but as a legal incident to their estate, for, as it was said in *Abraham* v. *Bubb*, "though, in some cases, *fortior est dispositio legis quam hominis*, yet that shall not be to encumber estates." (*b*)

It is to be remarked, that the object of the Court's interference *in granting an injunction to stay this kind of waste is not by way of satisfying a damage, but in order to prevent a wrong, and, therefore, a person cannot come into equity merely for an account, unless where the waste is of [*319]

(*q*) 11 Rep. 80.
(*r*) Aston v. Aston, 1 Ves. 265, 266.
(*s*) Vane v. Ld. Barnard, 2 Vern. 738, Prec. in Ch. 454, S. C. *sub nom.* Ld. Bernard's case.
(*t*) Aston v. Aston, 1 Ves. 265.
(*u*) Obrien v. Obrien, Amb. 107; Chamberlyne v. Dummer, 1 Bro. C. C. 166; Strathmore v. Bowes, 2 Bro. C. C. 88.
(*x*) Packington's case, 3 Atk. 215; Williams v. M'Namara, 8 Ves. 70.
(*y*) Lord Tamworth v. Ld. Ferrers, 6 Ves. 419.
(*z*) Day v. Merry, 16 Ves. 375.
(*a*) The Marq. of Downshire v. Lady Sandys, 6 Ves. 107.
(*b*) Freem. 53; Atty. Gen. v. Duke of Marlborough, 3 Mad. 539; Williams v. Williams, 15 Ves. 419.

that nature that the plaintiff has no remedy at law; the account depends entirely upon the injunction; it is incidental to and consequential upon it; and, if a person is entitled to the one, he is entitled to the other also, on the principle of preventing a multiplicity of suits; for, otherwise, he would be obliged to bring his action at law as well as his bill in equity,—his action by way of satisfaction, his bill by way of prevention. (*c*) But, after the determination of the tenant's estate, the bill will not lie for an account merely, where no injunction is prayed or necessary, and no injury is to be prevented; for, if there be nothing to be restrained in future, there is no reason why the Court should interfere, since the party injured has his remedy at law for that which is already passed. (*d*) However, the very reason given, viz: that the party injured has his remedy at law, is a proof that the rule ought not to apply where the waste and the remedy are strictly equitable; accordingly an account was granted in *Garth* v. *Cotton*, (*e*) although an injunction was not sought.

The same distinction is observed if the party who committed the waste dies, between those cases where the waste was legal and those cases where the waste was equitable. There is no instance of a decree against assets for an account of legal waste; since, so far as the act of the offender was beneficial, his assets would be answerable at law, and his executor would be charged; (*f*) and, as at law, if legal waste be committed and the party dies, an action for money had and received will lie against his representatives; so, upon the same principle, or rather by analogy thereto, if equitable waste be committed, and the party dies, he must, through his representatives, refund in respect of the wrong he [*320] had done, and not retain the produce *of his injury, which is recoverable in no other Court. (*g*) It would, says Lord Cowper, be a reproach to equity to say, when a man has taken my ore or timber, and disposed of it in his lifetime, and dies, that, in this case, I must be without remedy.

The Court will interfere, by injunction, to suppress the commission or continuance of a nuisance. Nuisances are of two kinds,—those which are injurious to the public at large, and those which are injurious to the rights and interests of private persons.

With regard to public nuisances, the jurisdiction seems to be of very ancient date, and to be founded on the irreparable damage to individuals or the great public injury which is likely to ensue. The jurisdiction is applicable not only to *nuisances* strictly so called, but also to *purprestures*. By *purpresture* is meant, in its present acceptation, an encroachment upon the Crown, either upon part of the demesne lands, or upon the high roads, rivers, forts, or streets, and the difference between *purprestures* and nuisances consists in this, that where the *jus privatum* of the Crown is invaded it is a *purpresture*, but where the *jus publicum* is violated it is a *nuisance*. (*h*)

In cases of *purpresture* the remedy is either by information for an intrusion at the common law, or by information in equity at the suit of the Attorney General. The consequence of a judgment at common law being the abatement of the erection or grievance complained of, whether it is or is not a nuisance; whilst upon an information in equity, where the trespass does not produce any public injury, the Court may direct an inquiry whether it is most beneficial to

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(*c*) Jesus Coll. v. Bloom, 3 Atk. 263; Amb. 54, S. C.

(*d*) Smith v. Cooke, 3 Atk. 381; Pulteney v. Warren, 6 Ves. 89; Grierson v. Eyre, 9 Ves. 346.

(*e*) 1 Dick. 183.

(*f*) Hambly v. Trott, Cowp. 376.

(*g*) Marq. of Lansdown v. March. Dow. of Lansdown, 1 Mad. 116; Bp. of Winchester v. Knight, 1 P. Wms. 406.

(*h*) 2nd. Inst. 38, 272; Harg. Law Tracts, 84, 87.

the Crown to abate the *purpresture*, or to suffer the erection to remain and be assessed as a part of the legal revenue. (*i*)

In cases of public nuisance, properly so called, an indictment [*321] *lies to abate them, and to prosecute the offender; but an information will also lie in equity to stop the mischief and to restrain the continuance of it. (*k*) And so it has been held that the Court of Exchequer, as well as the Court of Chancery, acting as a Court of Equity, has a well established jurisdiction upon a proceeding, by way of information, to prevent nuisances to public harbours and public roads, and, in short, to prevent public nuisances of all descriptions. (*l*) As a general rule the suit should be instituted by the Attorney General, or, at all events, he should be a party to it, unless the individual injury is distinct from that which is done to the public at large. In that case, but in that case only, the persons injured have a special right, in respect of which they are entitled to apply. (*m*) Wherefore, in informations and proceedings in cases of public nuisance, the ordinary course is for the Attorney General to take on himself to sue as representing the public; but it is equally certain that individuals who conceive themselves aggrieved may come forward and ask the assistance of the Court to prevent a public nuisance from which they have individually sustained damage. (*n*)

With regard to *private nuisances*, the Court will interfere by way of injunction where the mischief is irreparable. The general ground of its interference, is that sort of material injury to property or health requiring the application to prevent, as well as remedy, an evil, for which damages more or less would be given in an action at law. (*o*) It is not every case that would furnish a right of action against a party which would justify the interposition of the Court of Equity to redress the mischief or remove the annoyance. But there must be such an injury as from its nature is not susceptible of being adequately compensated for by damages, or such as, from its long continuance, occasions a constantly recurring grievance which *cannot be otherwise pre- [*322] vented but by an injunction. (*p*) Thus it has been said that every common trespass or a mere diminution of the value of the premises is not a ground for an injunction; but if the trespass continue so long as to become a nuisance, or if the diminution of the value of the premises amount to irreparable mischief, then the Court will undoubtedly interfere. (*q*) The ordinary instances in which the Court exercises this jurisdiction occur where it is called upon to restrain a party from building so near the plaintiff's house as to darken his *ancient lights*. (*r*) Injunctions have also been granted to stop the diversion of water-courses; and to prevent the pulling down of banks of rivers, whereby the plaintiff is exposed to inundations from which the banks had protected him. (*s*)

(*i*) Atty. Gen. v. Richards, 2 Anst. 603; Atty. Gen. v. Johnson, 2 J. Wil. 87; Rex. v. Earl Grosvenor, Starkie's N. P.

(*k*) Mayor of London v. Bolt, 5 Ves. 129; Atty. Gen. v. Nichol, 16 Ves. 338.

(*l*) Atty. Gen. v. Forbes, 2 M. & C. 123.

(*m*) Baines v. Baker, Amb. 158; Atty. Gen. v. Cleaver, 18 Ves. 211; Spencer v. the L. & B. Railway Company, 8 Sim. 193; Sampson v. Smith, ib. 272.

(*n*) Atty. Gen. v. Forbes, 2 M. & C. 123.

(*o*) Att. Gen. v. Nichol, 16 Ves. 342.

(*p*) Fishmongers' Comp. v. E. I. Comp. 1 Dick. 163; Atty. Gen. v. Nichol, *ubi supra*.

(*q*) Coulson v. White, 3 Atk. 21; and see Atty. Gen. v. Nichol, 16 Ves. 342.

(*r*) Ryder v. Bentham, 1 Ves. 543; Back v. Stacy, 2 Russ. 121; E. I. Comp. v. Vincent, 2 Atk. 83.

(*s*) Robinson v. Lord Byron, 1 Bro. C. C. 588; Lane v. Newdigate, 10 Ves. 194; Chalk v. Wyatt, 3 Mer. 688.

In the case of a private nuisance, it is generally necessary that a judgment at law declaring the rights of the parties should be previously ascertained, or, otherwise, the injunction will not be granted; (*t*) though, in a plain case of nuisance, where the injury is likely to be irreparable, as where loss of health, or loss of trade, or destruction of the means of subsistence might ensue, the Court will exercise its jurisdiction of preventing such an injury without waiting the slow process of establishing the legal right, when delay itself would be a wrong. (*u*)

Although in these and other cases, the jurisdiction has been acknowledged, and not unfrequently exercised, both when the nuisance was of a public, and also, when it was of a private nature, yet the injunction is only to restrain and not remove it, to prohibit and not to abate, to prevent irreparable mischief and not to undo what has been already done; that relief, if granted at all, can only be granted on the hearing; the principle being that only such a restraint shall [*323] be enforced as may *suffice to stop the grievance complained of; and when it is to stay any further injury, to keep things as they are at present. (*x*)

The next point of inquiry relates to those cases where injunctions will be granted to protect the interests of an inventor or an author in his patents or copyrights, that is, in the works of his ingenuity or the labours of his mind.

The principle upon which injunctions are granted in these cases, is not that there is no legal remedy, but that the law does not give *a complete* remedy to those whose property is invaded; for, if each infringement of the patent or copyright were to be made a distinct cause of action, the remedy would be worse than the evil; the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights. (*y*)

In addition to this consideration, the plaintiff could have no preventive at law to restrain the future use of his invention or the publication of his work injuriously to his title and interest. Besides which, in most cases of this sort, the bill usually seeks an account, in one case of the books printed, and, in the other, of the profits which have arisen from the use of the invention from the persons who have pirated the same; and, where the right has been already established, or, where it is established under the direction of the Court, there this account, will, in all cases, be decreed as incidental to the other relief, which may be obtained, prospectively, by a perpetual injunction. (*z*)

An injunction to restrain the infringement of a patent is not obtainable as a matter of course; the equitable title flows from the legal title. So also, with regard to copyrights. On both occasions it was formerly the practice, on opening the case, to send the party to law to establish his right. (*a*) But, on both [*324] occasions, the practice is altered, and now, *when the *right of the patentee appears on the* record, and the *patent has been granted for some length of time*, and the public has permitted the exclusive and undis-

(*t*) Chalk v. Wyatt, *ubi supra;* Atty. Gen. v. Cleaver, 18 Ves. 211; Wynstanley v. Lee, 2 Swanst. 333.

(*u*) 2 Swanst. 336; Atty. Gen. v. Doughty, 2 Ves. 453; and see Manly v. Hammet, 2 Dick. 488.

(*x*) Ryder v. Bentham, 1 Ves. 543; Blakemore v. the Glamorganshire Canal, 1 M. & K. 181.

(*y*) Hogg v. Kirby, 8 Ves. 223; Harmer v. Plane, 14 Ves. 132; Lawrence v. Smith, Jac. 472.

(*z*) Lord Red. 138; Hogg v. Kirby, 8 Ves. 223, 224; the Universities of Oxford and Cambridge v. Richardson, 6 Ves. 705, 706; Baily v. Taylor, 1 R. & M. 73.

(*a*) Dodsley v. Kinnersley, Amb. 406.

puted possession of it for several years—under such circumstances it will interpose by injunction, in the first instance, without putting the party, previously, to establish his right in an action at law. (*b*)

In such cases, however, there must be satisfactory evidence of exclusive possession by the patentee, and where this is wanting, the Court will not interfere without a trial at law. (*bb*)

But, *where the patent is only of recent date*, or, to use Lord Eldon's phrase, "where it is but of yesterday," there the Court will not act from its own notions respecting the matter in dispute, and presume its validity or invalidity without the right having been ascertained by a previous trial: but it will send the patentee to law and oblige him to establish the validity of his patent in a Court of Law before it will grant him the benefit of an injunction. (*c*) But, even in this case, it will use its discretion, and, whenever it sees sufficient ground of doubt, it will add to its more general directions, a direction that the party against whom the application is made, shall keep an account pending the discontinuance of the injunction, in order that it shall finally turn out that the plaintiff has a right to the protection he seeks, amends may be made for the injury occasioned by the resistance to his just demands. (*d*)

It may be mentioned here, that, in the case of *Collard* v. *Allison*, above referred to, (*dd*) the patentee obtained a verdict in support of his patent, but the defendant afterwards obtained a rule *nisi* for a new trial, which was pending when a subsequent application was made for an injunction, and the Court refused to grant the injunction till the decision of the Court of Law upon the new trial.

Similar principles apply to cases of copyright. (*e*) At first *the [*325] Court of Chancery would not give assistance, unless the complainant had a clear legal right; Lord Northington refused to interpose between two contending patents; (*f*) Lord Hardwicke acted in the same manner, where the question was doubtful, and the party applying had never had possession; (*g*) and several of the Judges in the great case of *Miller* v. *Taylor*, (*h*) laid it down as a clear universal rule, that the Court could not grant or sustain an injunction unless the title was made clear at law; but Lord Eldon has denied the universality which was said to belong to the equitable rule, qualifying it to the extent

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(*b*) Bolton v. Bull, 3 Ves. 140; Harmer v. Plane, 14 Ves. 133; Hill v. Thompson, 3 Mer. 622; and see Kay v. Marshall, 1 M. & C. 373.

(*bb*) Collard v. Allison, 4 M. & C. 487. (*c*) Hill v. Thompson, 3 Mer. 622.

(*d*) Ibid. 628, 629. (*dd*) *Ubi supra*.

(*e*) The copyright of *printed books*, &c., is vested in the authors or their assignees by the 8 Anne, c. 19, amended and extended by 54 Geo. 3, c. 156. The copyright in *prints and etchings* is secured by Stat. 8 Geo. 2, c. 13, amended by 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57. In *models and casts of busts*, &c., by Stat. 38 Geo. 3, c. 71, amended by 54 Geo. 3, c. 56; and *in designs for printing linens, calicoes and muslins* by 27 Geo. 3, c. 38, made perpetual by 34 Geo. 3, c. 38, and extended to *other woven fabrics* by 2 & 3 Vict. c. 13. *Lectures delivered orally* have also been protected from piracy by Stat. 5 & 6 Will. 4, c. 65, and by the 3 & 4 W. 4, c. 15. The authors of *dramatic entertainments not printed*, are declared to have the property in such entertainments, and have the sole right of representing it or causing it to be represented at any place of dramatic entertainment. The copyrights of the two universities in England and the four universities in Scotland, and of the colleges of Eton, Winchester, and Westminster, are confirmed and regulated by the Stat. 15 Geo. 3, c. 53; and, by the 1 & 2 Vict. c. 59, called "*The International Copyright Act*," her Majesty, in council, is empowered, under certain restrictions, to direct that the authors of books, first published in foreign countries, shall have a copyright in such books.

(*f*) Baskett v. Cunningham, 2 Eden, 137.

(*g*) Baskett v. the University of Cam. cited 6 Ves. 710.

(*h*) 4 Burr. 2325, 2328, 2400.

that an undoubted possession, under colour of title, is ground enough to enjoin and to continue the injunction until it is reversed at law. (*i*) In short, it amounts to this, that the Court will lend its aid when the legal title is either directly established by decision, or where it is apparently established by uninterrupted usage and possession. There are many circumstances, however, which may induce the Court to refrain from interfering before the right is ascertained and determined, for the equitable title flows from the legal title; and, therefore, where the one is doubtful the other will not necessarily follow. An injunction has, accordingly, been refused where the question has depended upon
[*326] the effect of an agreement, *for the facts may alter the effect of an agreement at law, and that must be looked to as to the right in equity. (*k*) An injunction has also been refused where the colour of the title, by the imprudence of the real proprietor, may equally rest with other persons, as where several individuals have been permitted to publish and sell the subject of the copyright, without any interposition on the part of the proprietor, for fourteen or fifteen years; for a Court of Equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things which occasions the application: (*l*) and an injunction has also been refused where the matter which was the subject of the alleged piracy formed but a very inconsiderable part of the defendant's work, so that the damage done to the plaintiff might be calculated in a few hours; (*m*) or where the conduct of the plaintiff has been such, as, in the opinion of the Court, would induce the defendant to believe that the course taken by them would not be objected to. (*n*)

There must be separate bills upon each distinct invasion of a patent or copyright, unless there is a privity between the parties who have infringed or pirated either the invention or the work. (*o*) There must be also an affidavit of title, when the injunction is applied for before answer. In the case of a patent, it is incumbent on the party making the application to swear as to his belief, at the time of making it, that the invention was newly introduced into the country; for although, when he obtained his patent, he might, very honestly, have sworn as to his belief of such being the fact, yet circumstances may have subsequently intervened, or information been communicated, sufficient to convince him that it was not his own invention and that he was under a mistake when he made his previous declaration to that effect. (*p*) In cases of copyright where the
[*327] proprietor is entitled under an assignment, he is bound to *shew that the assignment was made to him in writing, for it has often been determined, at law, that a copyright cannot be assigned in any other way. (*q*) But if the plaintiff happens to be in the situation of assignee of an assignee, it will be sufficient for him to shew that the assignment to himself was in writing, without tracing the title through the *mesne* assignees from the original author. Under such circumstances the Court will assume that the title is regular until the contrary is shewn. (*r*) The title, however, must be a legal and not an equitable one; it must be something more than an agreement to

(*i*) The Universities of Oxford and Cambridge v. Richardson, 6 Ves. 689; Lord Byron v. Johnston, 2 Mer. 29.

(*k*) Walcot v. Walker, 7 Ves. 1.

(*l*) Platt v. Button 19 Ves. 447; Coop. 303, S. C.; Rundell v. Murray, Jac. 311.

(*m*) Baily v. Taylor, 1 R. & M. 73; Whittingham v. Wooler, 2 Swanst. 428.

(*n*) Saunders v. Smith, 3 M. & C. 711. (*o*) Dilly v. Doig, 2 Ves. Jr. 486.

(*p*) Hill v. Thompson, 3 Mer. 624; Sturz v. De la Rue, 5 Russ. 328.

(*q*) Power v. Walker, 2 M. & S. 7; Morris v. Kelly, 1 J. & W. 481; Moore v. Walker, 4 Campb. 8 n.; Latour v. Bland, 2 Starkie, N. P. 382.

(*r*) Morris v. Kelly, 1 J. & W. 482.

assign, or a writing which evidences the intention of the parties; for a bill cannot be sustained unless the person who has the legal title is brought before the Court. (*s*)

It would greatly exceed the limits of our present inquiry to discuss the general rights of inventors and authors, or to state the circumstances under which an exclusive property, in virtue of these rights, may be acquired or lost; but, in examining those occasions in which injunctions will be granted, it is to be remembered that the Court will not interfere when the work is of a clearly irreligous, immoral, libellous, or obscene description; for a man has no claim upon this equitable protection where he has published and promulgated to the world what the law, from motives of the highest concern, will not admit to be capable of founding a just title to, as property. If an action cannot be maintained, nothing can be done in a Court of Equity which is only ancillary to the law; and, therefore, it will not give relief except where the law will give damages. (*t*) And not only will the Court refuse to interfere when it plainly sees that the work is obscene or immoral, but even if there be a doubt as to its evil tendency, it is not the province of a Court of Equity, although there may be the submission in the answer, to decree either an injunction or an account of the profits of a work of such a nature; (*u*) and it may be laid *down, as an universal rule, that where there is any doubt as to [*328] the exclusive legal title of the party claiming an injunction in aid of it, the Court will not exercise the jurisdiction without giving an opportunity of trying the legal title by proceedings at law. (*x*)

At times there is considerable difficulty in determining whether a work is pirated or not; for instance, it is allowable to make a *bonâ fide* extract, or a *bonâ fide* quotation, or a *bonâ fide* abridgment, or a *bonâ fide* use of common materials in the composition of another book; (*y*) for a man may fairly adopt part of another's labors in making an extract or quotation, but he must not do it unfairly, or, as Lord Ellenborough termed it, with an *animus furandi*; and so he may abridge, if the invention, learning, or judgment bestowed in making that abrigment will really constitute a new work, but he must not do either, in a colourable manner, to gain an advantage to himself by a fraudulent evasion of the statute. (*z*) So, in the case of a map or road-book, if the same skill, intelligence, and diligence are applied in the second instance as there was in the first, the public would receive nearly the same information from both works; but there is no doubt the Court would interfere to prevent a mere republication of a work which the labour and skill of another person had supplied to the world. The piracy, on such occasions, is frequently detected by the identity of the inaccuracies and errors; (*a*) and it may be observed that the question, whether one author has made a piratical use of another's work, does not necessarily depend upon the quantity of that work which he has quoted or introduced into his own book. (*b*)

(*s*) Colburn v. Duncombe, 9 Sim. 151.

(*t*) Lawrence v. Smith, Jac. 471; Hime v. Dale, 2 Campb. 28 n.

(*u*) Walcot v. Walker, 7 Ves. 1; Southey v. Sherwood, 2 Mer. 438; Burnet v. Chetwood, ib. 441.

(*x*) Bramwell v. Halcomb, 3 M. & C. 737.

(*y*) Short abridgments are allowed; Bell v. Walker, 1 Bro. C. C. 451; Gyles v. Wilcox, 2 Atk. 143.

(*z*) Butterworth v. Robinson, 5 Ves. 709; Longman v. Winchester, 16 Ves. 269; Matthewson v. Stockdale, 12 Ves. 270; Whittingham v. Wooler, 2 Swanst. 428; Wilkins v. Aikin, 17 Ves. 422.

(*a*) Cary v. Faden, 5 Ves. 24; and see Longman v. Winchester, 16 Ves. 269.

(*b*) Bramwell v. Halcomb, 3 M. & C. 736.

In some cases of this nature the Court will take upon itself the task of inspec-
[*329] tion, and compare the work of the original *author with the work alleged to be pirated; (b) but the usual practice is to refer the subject to the Master, who reports whether the books differ, and in what respect, and then the injunction is issued to restrain the publication of those parts which the Master reports to have been pirated. (c)

In a recent case, however, in which the Court, availing itself of the evidence read pending the motion, was led to conclude, that if the parts affected with the character of piracy were taken away, there would be left an imperfect work which could not to any useful extent serve the purpose intended by the publication, the injunction, to restrain the publication of any parts pirated from the plaintiff's work, was granted without waiting till all the parts pirated could be distinctly marked. (d)

And, in general, if the parts pirated are so mingled with the original portions of a work, that they cannot be separated, the Court will injoin the publication of the whole, although a very large proportion of the work may be unquestionably original. Upon this subject, Lord Eldon observed, that "he who has made an improper use of that which does not belong to him, must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion: if an individual chooses, in any work, to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction which restrained the publication of my literary matter prevents also the publication of his own literary matter, he has only himself to blame." (e)

By analogy to the principle upon which the Court proceeds in cases of copyright, it will also interfere to restrain the publication of *manuscript treatises*,
[*330] or *private letters* which bear *the character of literary composition: this was established with regard to manuscripts in *Mr. Webb's* and *Mr. Forrester's* cases, the former of whom had his Precedents of Conveyancing stolen out of his chambers, and the latter had his notes copied by a clerk to the gentleman to whom he had lent them; (ee) in both instances the printing and publishing them was restrained by injunction. The same protection was extended to Lord Clarendon's History, a copy of which had been given by his son to Mr. Gwynne; for it was not to be presumed, from such a gift, that he was to have the profits of multiplying it in print, although he might make every use of it except that. (f) Upon the same principle it was held, before the recent statute, (ff) that a copyright would still exist in the manuscript of a play, although it has been performed at a public theatre, and that a surreptitious copy of it, taken in short hand, from the mouths of the performers, would be restrained in equity; for the permission which the author gave to have it acted, did not amount to an abandonment of his title, or a dedication of it to the public at large. (g)

(b) *Vide* Whittingham v. Wooler, 2 Swanst, 428.

(c) Carnan v. Bowles, 2 Bro. C. C. 80; —— v. Leadbetter, 4 Ves. 681; Jeffery v. Bowles, 1 Dick. 429; Mawman v. Tegg, 2 Russ. 385.

(d) Lewis v. Fullarton, 2 Beav. 6. (e) Saunders v. Smith, 3 M. & C. 711.

(ee) Webb v. Rose, cited 2 Bro. P. C. 138; Forrester v. Waller, cited 4 Burr. 2331, and 2 Bro. P. C. 138; and see Southey v. Sherwood, 2 Mer. 434.

(f) Duke of Queensberry v. Shebbeare, 2 Eden, 329.

(ff) 3 & 4 W. 4, c. 15.

(g) Macklin v. Richardson, Amb. 694; Morris v. Kelly, 1 J. & W. 481.

With regard to letters which bear the character of literary compositions, they must be treated as within the laws protecting the rights of literary property, and a violation of those rights is affected with the same consequences as the publication of a treatise in manuscript. Upon this ground Pope's, Swift's, and Lord Chesterfield's Letters have all been protected by means of an injunction; (*h*) but a question has been raised and a doubt suggested, as to how far the like protection would be given where the letters published did not fall, in strictness, within the terms of literary compositions. It is now, however, settled that the writer of a letter has a joint property in it with the person to whom it is addressed; the receiver has a special property in it; but no more: it is a gift to him for the purpose *of reading, and in some cases for the purpose of keeping it, but *ultra* the purposes for which it was sent, [*331] the property of the letter remains in the sender, which, being so, it cannot be published without the writer's consent. And it is immaterial whether the publication is made with a view to profit or not; if for profit, the party is then selling; and if not for profit, he is then giving that, a portion of which belongs to the writer: such appears to be the result of the decisions on this subject. (*i*) But, notwithstanding this right of property, the conduct of the plaintiff may be such as not to entitle him to the interference of the Court; and so it was held in *Perceval* v. *Phipps*, where the plaintiff was left to his legal remedy, having held the defendant out to the public as a person giving false intelligence, upon spurious authority, when that intelligence had come from the plaintiff himself, as was proved and confirmed by several letters which formed the subject of dispute. (*k*)

Injunctions will also be granted against publishing a magazine in a party's name who has ceased to authorize it, (*l*) and from vending an article of trade under the name of a party with false labels, to the injury of the party, who has already acquired a reputation in trade by it. (*m*)

Upon similar grounds of irreparable mischief, Courts of Equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment; and it matters not, in such cases, whether the secrets be secrets of trade or secrets of title, or other secrets of the party important to his interests. (*n*) The Court, however, refused to grant an injunction to restrain the defendant from imparting the secret of an invention which had been the subject of a patent long since expired. (*o*)

The next purpose for which injunctions may be applied, is *to prevent the alienation of property where it would work an irremediable or gross injustice: under such circumstances an injunction will be granted, and so it often has been, when the alienation contemplated was strictly legal, but other circumstances, which the Courts of Law could not take notice of, would have rendered it improper that such an alienation should be made: thus in the case of negotiable instruments, if a bill or note affected with fraud is transferred to a *bonâ fide* holder, without notice, the latter may be entitled to recover upon it; for the bill or note would be a good security in the hands of the person to whom it was so transferred, and therefore the person against whose rights they may be made available, is entitled to protection from that dan- [*332]

(*h*) Pope v. Curl, 2 Atk. 342; Thompson v. Stanhope, Amb. 737.
(*i*) E. of Granard v. Dunkin, 1 B. & B. 207; Pope v. Curl, 2 Atk. 342; Gee v. Pritchard, 2 Swanst. 403.
(*k*) Lord and Lady Perceval v. Phipps, 2 V. & B. 19.
(*l*) Hogg v. Kirby, 8 Ves. 215; Eden on Injunct. ch. 14, p. 313, 314.
(*m*) Eden on Injunct. p. 314, 315, *et vide* Millington v. Fox, 3 M. & C. 338.
(*n*) Cholmondeley v. Clinton, 19 Ves. 261, 267: Evitt v. Price, 1 Sim. 483; Yovatt v. Winyard, 1 J. & W. 394.
(*o*) Newbery v. James, 2 Mer. 446.

ger and the mischief attending it; (*p*) accordingly, the parties will be restrained by injunction on the filing of the bill, and the application for it may be made *ex parte*, if it is supported by an affidavit verifying the truth of the fraudulent circumstances, lest the defendant should, upon intimation of the suit, defeat its object by negotiating the security. (*q*) It has recently been decided, that even a *bonâ fide* holder of a bill of exchange which has been negotiated by means of a forgery of the name of the payee as indorsee, will be restrained from suing the acceptor upon it, and that the Court will, at the hearing, direct the forged instrument to be delivered up to be cancelled; for though the holder may have paid a value for it, yet if the indorsement under which he received it is a forgery, it is the same thing as if there was no indorsement of it, and then he is not in truth the holder of it, for he has no title by indorsement, and that was the only way by which he could obtain a title to it. (*r*)

Upon a like principle, the Court will interfere to restrain the transfer of stock, [*333] or the receipt of bank annuities, (*s*) or the *sale of specific chattels, as when the title of stock is controverted between principal and agent; (*l*) or, when the dividends have been applied by a society on erroneous principles, so as to exhaust the whole fund; (*m*) or when it is necessary to protect the enjoyment of specific chattels which cannot be the subject of compensation in damages. (*n*) And if a suit is actually depending in the Ecclesiastical Courts with respect to the title to stock, or with regard to the validity of a probate, or when the representation is in dispute, the Court will restrain the parties *pendente lite* from receiving or dealing with the property of the deceased. But a distinction must here be made, for if there is a contest who shall be the executor or administrator, and there is nothing to shew who is to be considered as sustaining either of those characters, the interference of the Court is quite of course; (*o*) if, however, a probate or letters of administration have been previously granted, and a suit has been instituted in the Ecclesiastical Courts to dispute their validity, the Court of Chancery will not interfere, *as a matter of course*, because there has been an adjudication already; wherefore, under such circumstances, it looks into the whole case, and if it sees sufficient ground for its interposition, such as fraud, insolvency, or a *devastavit*, it grants an injunction, and also a receiver pending the litigation; (*p*) but where a plaintiff has instituted proceedings in the Ecclesiastical Court, for the mere purpose of challenging a will, without alleging any special matter, he cannot put forward that circumstance as of itself furnishing a sufficient reason for depriving his adversary of his legal title to administer the assets; there must be some other reason. (*q*)

(*p*) 1 Fonbl. on Eq. c. 1, s. 8, n. y; Smith v. Haytwell, Amb. 66; Lloyd v. Gurdon, 2 Swanst. 180; Patrick v. Harrison, 3 Bro. C. C. 47.

(*q*) Smith v. Aykwell, 3 Atk. 566; Hood v. Aston, 1 Russ. 412.

(*r*) Esdaile v. La Nauze, 1 Y. & C. 394.

(*s*) For the method of proceeding to restrain a transfer of stock, by the Governors of the Bank of England, or the Governors of South Sea stock, or the East India Company, *vide ante*, vol. 1, p. 197 *et seq.*

(*l*) Lord Chedworth v. Edwards, 8 Ves. 46; *sed vide* Cox v. Paxton, 2 Mad. Ch. Pr. 2d ed. 155.

(*m*) Reeve v. Parkins, 2 J. & W. 390. (*n*) Lady Arundell v. Phipps, 10 Ves. 139.

(*o*) King v. King, 6 Ves. 172; Watkins v. Brent, 1 M. & C. 102; Atkinson v. Henshaw, 2 V. & B. 85.

(*p*) Andrews v. Powys, 2 Bro. P. C. 504; Knight v. Duplessis, 1 Ves. 324; Ball v. Oliver, 2 V. & B. 96; Watkins v. Brent, 7 Sim. 512; 1 M. & C. 97, S. C.; Marr v. Littlewood, 2 M. & C. 454.

(*q*) Jones v. Frost, 3 Mad. 1; Dew v. Clarke, 1 S. & S. 108; and see what is said in 1 M. & C. 103, and 2 M. & C. 457.

The Court, acting upon the principles above laid down, will also grant an injunction to restrain a party from making *vexatious alienations of [*334] real property, *pendente lite;* (r) so it will enjoin a vendor from conveying the legal title to real estate, pending a suit for the specific performance of a contract for the sale of that estate; (s) for, in every such case, the plaintiff may be put to the expense of making the vendee a party to the proceedings; and, at all events, his title, if he prevails in the suit, may be embarrassed by such new outstanding title under the transfer. Although the maxim of law says "*pendente lite nil innovatur*," that maxim is not to be understood as warranting the conclusion, that the conveyance so made is absolutely null and void, at all times, and for all purposes: the true interpretation of the maxim is, that the conveyance does not vary the rights of the parties in that suit; and they are not bound to take notice of the title acquired under it; with regard to them, the title is to be taken as if it had never existed, as otherwise suits would be interminable, if one party pending the suit, could, by conveying to others, create a necessity for introducing new parties. (t)

In like manner sales may be restrained in all cases where they are inequitable, or may operate as a fraud upon the rights or interests of third persons; as in cases of trusts and special authorities, where the party is abusing his trust or authority: (u) and where sales have been made to satisfy certain trusts and purposes, and there is danger of a misapplication of the proceeds, Courts of Equity will also restrain the purchaser from paying over the purchase money. (x) So also husbands may be restrained from transferring property in fraud of the equitable rights of their wives. (y)

Acting upon the same principles, the Court will, where there is a dispute respecting the right of presentation to an ecclesiastical benefice, not only restrain the party having the legal *right of presentation from presenting, [*335] but it will also enjoin the Bishop from inducting and from taking advantage of a lapse pending the litigation, by collating to the benefice, till the decree of the Court. (z)

The Court has also, upon the same ground, restrained the trustees of a dissenting chapel, from appointing as a minister of that chapel, a person not duly qualified according to the constitution of the chapel, to hold the office, although it refused that part of the motion which asked for an injunction to restrain the trustees from permitting persons not duly qualified from officiating occasionally, during the short time that might elapse before the hearing, when the facts upon both sides must be known. (a)

Injunctions have, in like manner, been granted to restrain indorsement of the certificate of a ship's registry, (aa) or the sailing of a ship, upon the application of a part owner, whose share was unascertained, in order to ascertain that share, and to obtain the usual security given in the Court of Admiralty for the

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(r) Daly v. Kelly, 4 Dow. 440.

(s) Echliff v. Baldwin, 16 Ves. 267; Daly v. Kelly, 4 Dow. 435.

(t) Metcalfe v. Pulvertoft, 2 V. & B. 205; Bishop of Winchester v. Paine, 11 Ves. 197; Gaskell v. Durdin, 2 B. & B. 169; Bishop of Winchester v. Beavor, 3 Ves. 314; Moore v. M'Namara, 2 B. & B. 186; *et vide ante*, vol. 1, p. 377.

(u) Anon. 6 Mad. 10.

(x) Green v. Lowes, 3 Bro. C. C. 217; Mathews v. Jones, 2 Anst. 506; Hawkshaw v. Parkins, 2 Swanst. 549.

(y) Anon. 9 Mod. 43; Eden on Inj. ch. 14, p. 295, 296; Roberts v. Roberts, 2 Cox, 422; Flight v. Cook, 2 Ves. 619; 1 Eq. Ca. Ab. 360, pl. 4; Cadogan v. Kennett, Cowp. 436.

(z) Nicholson v. Knapp, 9 Sim. 326.

(a) Milligan v. Mitchell, 1 M. & K. 446.

(aa) Thompson v. Smith, 1 Mad. 395.

due return of the ship. (*b*) So they will be granted against the removal of timber wrongfully cut down. (*c*)

Injunctions will also be granted to compel the due observance of personal covenants, where there is no effectual remedy at law: thus, in the old case of the parish bell, where certain persons owning a house in the neighbourhood of a church, entered into an agreement to erect a cupola and clock, in consideration that the bell should not be rung at five o'clock in the morning, to their disturbance; the agreement being violated, an injunction was afterwards granted to prevent the bell being rung at that hour. (*d*) Upon the same ground, a celebrated *play writer, who had covenanted not to write any dramatic performances for another theatre, was, by the injunction, restrained from violating the covenant. (*e*) So an author who had sold his copyright in a work, and covenanted not to publish any other to its prejudice, was restrained by injunction from so doing. (*f*)

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Upon the same ground, in *Rankin* v. *Huskisson*, (*g*) an injunction was granted to restrain the Commissioners of Woods and Forests from building on the site of Carlton Gardens, in violation of the terms of an agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site.

Injunctions have also been granted to restrain a party who has sold the good-will of his trade, and covenanted not to exercise the same trade within certain limits, from exercising such trade within the prescribed limits: thus where a coach-master having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from Reading to London, or prejudicial to the business which he had sold, set up a coach to run from Pangborne to London, through Reading, he was restrained from running the coach from Reading to London and *vice versa*. (*h*)

Upon the same principle, where bankers had sanctioned an arrangement entered into by certain persons, copartners, who were indebted to them, whereby it was arranged that, upon the retirement of one of the copartners, (the plaintiff,) the assets should be transferred to the continuing partners, who were to take upon themselves the partnership liabilities, and that the bankers should release the plaintiff, who was the retiring *partner, from his liability to them, but afterwards attempted, by means of the debt, to make the retiring partner a bankrupt, by proceeding under the 1 & 2 Vict. c. 110, s. 8; (*i*) they were restrained from so doing by injunction.

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(*b*) Haly v. Goodson, 2 Mer. 77; Christie v. Craig, ib. 137; Abbott on Shipp. pt. 1, ch. 3, ss. 4, 5. The Court refused to restrain the sailing of a ship on the application of a part owner, where the ship was intended to sail on the next day, and it did not appear, by the affidavit, that there was any circumstance to account for the plaintiff's delay in applying. Christie v. Craig, 2 Mer. 137. The Court also refused to stop the sailing of a ship on the ground that it contained goods which belonged to the plaintiff, but which he had sold to a party who had become insolvent, but over which he had retained a right of stoppage in *transitu*. Goodhart v. Lowe, 2 J. & W. 349.

(*c*) Anon. 1 Ves. J. 93. (*d*) Martin v. Nutkin, 2 P. Wms. 266.

(*e*) Morris v. Colman, 18 Ves. 437; Clarke v. Price, 2 Wils. 157.

(*f*) Barfield v. Nicholson, 2 S. & S. 1. (*g*) 4 Sim. 13.

(*h*) Williams v. Williams, 2 Swanst. 253. Although it has been long settled that covenants restraining the exercise of a trade in a *particular place*, as contradistinguished from covenants in general restraint of trade, are valid, and that Courts of Equity will compel the specific performance, and enjoin against the violation of such covenants, yet it has also been held, that the mere sale of the good-will of trade imposes no obligation on the vendor to forbear the exercise of the same trade, and that Courts of Equity will not execute a contract for the sale of a good-will. Ibid. note (*a*), *et vide* the cases there cited.

(*i*) Attwood v. Banks, 2 Beav. 192.

Injunctions have also been, frequently, granted to restrain lessees who had covenanted to keep the banks of rivers or ponds in repair, from destroying or impairing them; (*k*) or an outgoing tenant from removing dung or crops, contrary to express covenants contained in his lease; (*l*) or, where the violation of the covenant was not provided for, by liquidated damages, to restrain the ploughing up of meadow, &c. (*m*)

In one of the earliest cases upon this subject, an injunction was granted till the hearing, by the House of Lords, upon appeal, to restrain a lessee from digging sand, gravel, &c., in violation of a covenant secured by a penalty; (*n*) and in a case shortly afterwards, before Lord Hardwicke, an injunction was granted, expressly for the purpose of restraining a breach of covenant, by a tenant, who was converting houses to a different use from that prescribed by his lease. (*o*)

Though a lessee is required, by law, to cultivate the lands demised to him in a husbandman-like manner, conformable to the custom of the country, (*p*) yet this is usually defined by some express covenant. It has, upon this subject, been determined at law, that a covenant to occupy in a good and husbandman-like manner, according to the custom of the country, will be broken by contravening the prevalent course of husbandry in the neighbourhood; and that, even if the contract be simply to *occupy the estate in a good and [*338] husbandman-like manner, this will throw a liability upon the tenant to cultivate the land according to the practice of the neighbourhood; (*q*) and even, though a farm be held under a written agreement, the custom of the neighbourhood may well be insisted upon, provided it be not either expressly or by implication excluded by the terms of the agreement. (*r*) The same principle has been acted upon in equity, where an injunction has been granted to restrain a tenant from year to year, (who, it was said, was equally bound as a tenant for a longer period, to manage his farm in a husbandman-like manner,) from removing crops, manure, &c., contrary to the custom of the country. (*s*) In a previous case a tenant was restrained from ploughing up pasture land, although the lease did not contain an express covenant not to convert pasture into arable; but the landlord was holden intitled to the injunction, on the ground of there being a covenant to manage pasture in a husbandman-like manner. (*t*) Upon the same principle, the Court has interfered to restrain a tenant from sowing mustard, saffron, woad, and other deleterious crops, as being contrary to the course of husbandry. (*u*)

A distinction has been made, as to enforcing, by injunction, the specific performance of *express covenants* and of *implied agreements;* and the Court has

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(*k*) Eden on Inj. 198; Lord Bathurst v. Burden, 2 Bro. C. C. 64; Lord Kilmorey v. Thackeray, cited ibid.

(*l*) Johnson v. Goldswaine, 3 Anst. 749; Geast v. Lord Belfast, ib. n.; Pulteney v. Shelton, 5 Ves. 147, 260, and errata, ib.; Lord Grey de Wilton v. Saxon, 6 Ves. 106. The case of Lathropp v. Marsh, 5 Ves. 259, is stated to be clearly wrong, as there were not only breaches of covenant, but also distinct acts of waste committed and threatened. Eden on Inj. 198.

(*m*) Aylet v. Dodd, 2 Atk. 238; Woodward v. Giles, 2 Vern. 119; Rolfe v. Peterson, 2 Bro. P. C. ed. Tomlins, 436.

(*n*) City of London v. Pugh, 4 Bro. P. C. ed. Toml. 395; Eden, 199.

(*o*) Worden v. Ellers, 18 Dec. 1739. There is a very full account of Lord Hardwicke's judgment, 6 Serjt. Hill's MSS. 2 & 12, ib. 76; Eden, 199.

(*p*) Powley v. Walker, 5 T. R. 373; Eden, 199.

(*q*) Legh v. Hewitt, 4 East, 154.

(*r*) Wigglesworth v. Dallison, Dougl. 201; Senior v. Armitage, 1 Holt. N. P. C. 197; Webb v. Plummer, 2 B. & A. 746; Eden, 199.

(*s*) Onslow v. ——, 16 Ves. 173. (*t*) Drury v. Molins, 6 Ves. 328.

(*u*) Pratt v. Brett, 2 Madd. 62; Eden, 200.

refused to interfere to restrain a tenant, who was holding over, from removing articles contrary to the custom of the country, as the Court would not imply special covenants, as to cultivation, from the mere act of holding over. (*x*)

A covenant to repair, and, at the end of the term, to surrender buildings in good condition, does not preclude an injunction against pulling them down and carrying away the materials just before the end of the term. (*y*)

[*339] Where there is a covenant not to convert premises into a *shop, or to carry on a trade without a license in writing; the permission of the lessor, without writing, to carry on one trade will not amount to a general license for any trade, so as to preclude the lessor from his right to an injunction. (*z*)

It may be observed here, that, as the Court will, by its injunction, compel the performance of a covenant or agreement, so, on the other hand, it will relieve a party against the consequences of this nonperformance of it, where such consequences involve either a forfeiture or the imposition of a penalty.

The doctrine, upon the subject of relief from penalties, has thus been stated by Lord Thurlow:—"Where a penalty has been inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only is accessional, and to secure the damage really incurred." (*a*) But where the parties, instead of securing the performance of the agreement by a penalty, have fixed upon a certain sum by way of liquidated damages, to be paid in the event of the nonperformance of the agreement, a Court of Equity, (except in certain cases of waste, which will be noticed hereafter,) refuses to interfere in restraining the recovery of such damages.

Upon these principles, Courts of Equity interpose to restrain proceedings at law for the recovery of penalties. But where a forfeiture had happened under a bye-law of a corporation, which provided that members should receive notice of default in paying a call, and incur the forfeiture by nonpayment ten days after the notice sent, Sir W. Grant refused to relieve, although the lapse arose from accidental circumstances, and absence from town when the notice was sent; he mentioned a case in Ireland of a person who, after having paid some instalments on a lease, neglected to make a further payment, and forfeited the instalments he had paid; (*b*) and though relief has sometimes been given against the forfeiture of a covenant for a renewal, (*c*) which, in Ireland, formed a dis-

[*340] tinct head of *local equity, (*d*) yet the inclination of the Courts is to the contrary, unless the right has been forfeited in consequence of fraud, accident, mistake, or any similar equity. (*e*)

A common instance of this species of relief is that which is given against a clause of re-entry for nonpayment of rent. This has been a ground of equi-

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(*x*) Kimpton v. Eve, 2 V. & B. 349; Eden, 200.

(*y*) Mayor, &c. of London v. Hedger, 18 Ves. 355; Eden on Inj. 260.

(*z*) Macher v. Foundling Hospital, 1 V. & B. 188; Eden on Inj. 201.

(*a*) Sloman v. Walter, 1 Bro. C. C. 419.

(*b*) Sparks v. Liverpool Waterworks Company, 13 Ves. 428.

(*c*) Rawstorne v. Bentley, 4 Bro. C. C. 415.

(*d*) O'Neil v. Jones, 1 Ridg. 170; Kane v. Hamilton, ib. 180; Bateman v. Murray, ib. 187; Boyle v. Lysaght, ib. 184; Vern. & Scriv. 135, S. C.; Magrath v. Lord Muskerry, ib. 166; 1 Ridg. 463, S. C.; Jackson v. Saunders, 1 Sch. & Lef. 443; 2 Dow. 437; Lennon v. Napper, 2 Sch. & Lef. 682; Magrane v. Archbold, 1 Dow. 109; Earl of Mountnorris v. White, 2 ib. 459; Barrett v. Burke, 5 ib. 1; Keating v. Sparrow, 1 B. & B. 367; Jessop v. King, 2 ib. 81; Barrett v. Pearson, ib. 189.

(*e*) Eden on Injun. 23; Allen v. Hilton, 1 Fonb. 432, 5th ed.; Bayley v. Corporation of Leominster, 3 Bro. C. C. 529; Baynham v. Guy's Hospital, 3 Ves. 295; Eaton v. Lyon, ib. 690; City of London v. Mitford, 14 Ves. 41.

table interference from the earliest times, and there has been a parliamentary recognition of the doctrine by the St. 4 Geo. 2, c. 28, ss. 2 and 3, which, limiting the time within which such relief is to be given to six months, permits the tenant to pay into Court, at any time before the trial of an ejectment, the arrears of rent and costs, and provides that all further proceedings shall thereupon cease. (*ee*)

This relief is granted upon the principle that compensation is made to the landlord by the payment of the rent with interest; a doctrine contradicted by general experience and often found fault with as imperfect and unjust. (*f*) Lord Northington appears, by analogy to it, to have been of opinion, that the Court might relieve where a tenant had committed a forfeiture by cutting down timber. (*g*) It is, however, scarcely necessary to remark how extremely inadequate pecuniary compensation must generally be in such a case; and it is probable, if the question is ever maturely considered, that a contrary determination will be adopted.

But where it is clear that the covenant is of such a nature that a Court of Equity cannot make a compensation for the *breach of it, as in the case of covenants *not to assign without license* (*h*) or to *keep the premises insured*, (*i*) relief will not be given against the penalty. Considerable discussion, also, has taken place how far the Court would relieve against a forfeiture incurred by the breach of a covenant *to repair*. In the case of *Sanders* v. *Pope*, (*k*) Lord Erskine, upon the authority of a determination of Lord Macclesfield, (*l*) expressed a strong opinion in favour of the equitable jurisdiction; but the doctrine, after full and elaborate discussion, has been established to the contrary. (*m*) The same determination would, consequently, be made with respect to the breach of a covenant *to build*, though the authorities are conflicting as to the power to decree a specific performance in such case. (*n*)

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Injunctions may also be issued for the protection of a ward of Court from removal, marriage, or improper influence; and, likewise, in cases of interpleader: but as the principle upon which the Court proceeds, in cases of this description, will be discussed in future stages of this work, they will not be further alluded to in the present section.

Courts of Equity will likewise prevent a person from setting up an unconscientious advantage at law, so as to interpose impediments to the just rights of the other party. Thus, if an ejectment is brought to try a right to land, the Court of Chancery will restrain the party in possession from setting up a term of years or other interest in a trustee, lessee, or mortgagee, which may hinder

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(*ee*) Eden on Injun. 23.

(*f*) Hill v. Barclay, 16 Ves. 405; 18 Ves. 61. S. C.; Bracebridge v. Buckley, 2 Pri. 216; Reynolds v. Pitt, 19 Ves. 140.

(*g*) Northcote v. Duke, 2 Eden, 322; Amb. 511, S. C.

(*h*) Wafer v. Mocato, 9 Mod. 112.

(*i*) Rolfe v. Harris, 2 Pri. 206, n.; Reynolds v. Pitt, ib. 212; 19 Ves. 134, S. C.; White v. Warner, 2 Mer. 459.

(*k*) 12 Ves. 282.

(*l*) Hack v. Leonard, 9 Mod. 91.

(*m*) Hill v. Barclay, 16 Ves. 402; 18 Ves. 56. S. C.; Bracebridge v. Buckley, 2 Pri. 200; *sed vide*, Hannam v. South London Waterworks Company, 2 Mer. 67.

(*n*) There are two instances of specific performance decreed of covenants to rebuild; City of London v. Nash, 3 Atk. 515; 1 Ves. 120; Allen v. Harding, 2 Eq. Ca. Ab. 17; and, in Moseley v. Virgin, 3 Ves. 184, Lord Rosslyn stated that a specific performance might be decreed. Lords Thurlow and Kenyon, on the other hand, have pronounced a contrary opinion, Errington v. Aynesly, 2 Bro. C. C. 343; Lucas v. Comerford, 3 Bro. C. C. 166; 1 Ves. J. 235. S. C. That a covenant to repair cannot be specifically performed, *vide* Rayner v. Stone, 2 Eden, 128; Flint v. Brandon, 8 Ves. 159. Eden on Inj. 27.

[*342] *the fair trial of the right; (o) but this will not be done in every case, for, as the Court proceeds upon the principle that the party in possession ought not, in conscience, to use an accidental advantage, if there is any circumstance which meets the reasoning upon this principle, the Court will not interfere; therefore, if the possessor is a purchaser for valuable consideration, without notice of the title of the claimant, this is a title, in conscience, equal to that of the claimant, and the Court will not restrain the possessor from using any advantage he may be able to gain to defend his possession. (p)

Where an injunction is sought to prevent the setting up of outstanding terms, it can only be obtained, (except with consent,) by a decree at the hearing; for, until the decree, the Court must suppose the parties to be litigating upon questionable rights: the injunction cannot be applied for by a previous motion, for it might afterwards appear, when the case is heard, that there are circumstances which would entitle the defendant, as well as the plaintiff, to equitable assistance at the trial; and, therefore, to grant such relief upon motion would be to decide the whole equity of the case before it was ripe for decision. (q)

Lastly, it is to be noticed, that, where repeated attempts are made to litigate the same question, which the Courts of ordinary jurisdiction will, in many cases, admit, the Court of Chancery will put an end to the oppression which may be occasioned by the abuse of this privilege. Thus, as a judgment in ejectment is not final or conclusive, but the same proceedings may be repeated for ever, a perpetual injunction will be granted, to prevent the repetition of them, when the assertion of such right becomes oppressive to the opposite party. (r) *It is on this ground that Courts of Equity have interfered, by bills of peace; but as the writ is not issued, in such cases, unless upon decree, they do not come within the province of the present section.

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It is to be observed that the Court will not, by injunction granted upon an interlocutory application, direct the defendant to *perform* an act. There is indeed a passage in the MS. report of the case of *Worden* v. *Ellers*, (s) from whence it may be inferred to have been Lord Hardwicke's opinion that the Court might, upon motion, order the defendant to pull down a building which was clearly a nuisance to the plaintiff; and there is an early case in Tothill, of an order to shew cause why a defendant who had ploughed up ancient pasture land should not lay it down again in grass. (t) The contrary doctrine is, however, now firmly established. In the case of *Ryder* v. *Bentham*, (u) Lord Hardwicke, upon a motion for an order to pull down certain blinds, observed, that he never knew an order to pull down any thing, on motion. Lord Thurlow, in a subsequent case, upon a motion to restrain a party from digging a

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(o) Lord Red. 134, 135; Bond v. Hopkins. 1 Sch. & Lef. 430; Pulteney v. Warren, 6 Ves. 89; Crow v. Tyrrell, 3 Mad. 181; Leigh v. Leigh, 1 Sim. 349.

(p) Jessard v. Saunders, 2 Ves. J. 457, 458; Maundrell v. Maundrell, 7 Ves. 567; 10 Ves. 246, S. C.; Baker v. Mellish, ib. 549.

(q) Hylton v. Morgan, 6 Ves. 293; Byrne v. Byrne, 2 Sch. & Lef. 537; Barney v. Luckett, 1 S. & S. 419; Northey v. Pearce, ib. 420.

(r) Lord Bath v. Sherwin, Prec. in Ch. 261; 4 Bro. P. C. 373, S. C.; Leighton v. Leighton, 1 P. Wms. 671; 4 Bro. P. C. 378, S. C.; Devonsher v. Newenham, 2 Sch. & Lef. 211.

(s) 18 Dec. 1739; 6 Serjt. Hill's MSS. 2 & 12 ib. 76; Eden on Inj. 199.

(t) Rolls v. Miller, Toth. 144.

(u) 1 Ves. 543.

ditch, and to compel him to put every thing in the same state in which it was before by filling up so much as he had already dug, refused the latter part of the motion. (*x*) So, in another case, Lord Eldon refused an order specifically to repair the banks of a canal, stop gates, and other works. (*y*)

But though the Court will not, directly and in terms, compel the performance of an act upon motion, yet there are many cases in which the effect may be indirectly obtained by an order merely restrictive. Thus, in the case of *Robinson* v. *Lord Byron*, the effect was obtained by an injunction restraining the *defendant from preventing the water from flowing in such regular [*344] quantities as it had ordinarily done before the day on which the alleged nuisance commenced. (*z*) In *Lane* v. *Newdigate*, (*a*) a similar effect was obtained by restraining the defendant from impeding the plaintiff from navigating, using, and enjoying, by continuing to keep the canals, banks, or works out of repair, by diverting the water, or preventing it by the use of locks from remaining in the canals or by continuing the removal of a stop gate.

Special injunctions may be obtained at almost any stage of the cause; they may be moved for either after answer or before answer, and they are also very often granted before appearance; and, in certain cases, they will be ordered without notice to the party intended to be restrained and before he has been actually served with a *subpœna*.

When a bill seeks to restrain the defendant from proceeding in an action at law, and the defendant is diligent enough to prevent the common injunction from issuing, by filing a sufficient answer within the time limited by the order of the Court, (*b*) the only way in which the plaintiff can obtain an injunction is by moving for one upon the merits confessed in the answer.

The motion for this purpose is special, and notice of it must be served two clear days before the day of making it, (*c*) and it is to be observed, that, where an injunction is sought against several defendants, although a plaintiff may be entitled to a common injunction upon default against one or more of them, yet if the other defendants, against whom the injunction is sought, have answered, he must still move specially for it; and that where the common injunction had been obtained for want of an answer of two defendants, who resided abroad, without notice to another defendant, who had answered in time, and who was the sole plaintiff at *law, the Court of Exchequer dissolved the [*345] injunction for irregularity. (*d*)

It is to be observed that the granting a special injunction upon the merits confessed in the answer, is not confined to injunctions to stay proceedings at law, but will be extended to injunctions to restrain any other act which the Court is in the habit of prohibiting by this writ, and that, in hearing the application, the Court is governed by the same rules, with relation to affidavits, as in the case of motions, after answer to restrain proceedings at law; therefore, in moving for a special injunction upon the merits confessed in the answer, the plaintiff is as strictly tied down to reading the answer in support of his case, as he is in shewing cause upon merits against dissolving the common injunc-

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(*x*) Anon. 1 Ves. J. 140.

(*y*) Lane v. Newdigate, 10 Ves. 192; *vide etiam* Blakemore v. the Glamorganshire Canal Comp. 1 M. & K. 154.

(*z*) 1 Bro. C. C. 588.

(*a*) 10 Ves. 192.

(*b*) *Ante*, p. 278.

(*c*) *Ante*, p. 258.

(*d*) Cooper v. Flindt, Wightwick, 409.

tion; and he can only read affidavits in those instances in which they are allowed to be read in that case. (*e*)

It may be mentioned, however, that where, upon a motion for an injunction, after appearance, the defendant applied that it might stand over in order that he might file affidavits in opposition to it, and then, instead of filing affidavits, put in an answer, Lord Eldon said that, in such cases, he had always said that he should look at the answer as an affidavit, and allow the original affidavit to be read, and that it was a different case from one in which the answer comes in regularly in time. (*i*)

So also, where notice of motion for an injunction was given for a particular day, and there was no time to make the motion on that day, and the motion accordingly stood over, but not at defendant's request, Lord Eldon held that the affidavit which had been filed before the day when the motion was to be made might be read, although the defendant had, in the meantime, put in his answer. "The practice, in these cases, is to allow the affidavit to be read, and to look upon the answer as a counter *affidavit;" (*k*) and it seems to make no difference if the plaintiff himself has postponed the motion by saving the notice of motion. (*l*)

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It is obvious that, in many cases in which the Court interferes by injunction, the benefit of its interference would be lost, if the plaintiff were to be obliged to wait till the defendant had answered his bill, before he moved for the writ. The nature of the act to be prohibited is frequently such that the immediate stoppage of it is absolutely necessary in order to protect property from destruction, as in the case of waste by the cutting of timber, pulling down houses, &c.; consequently the delay which must occur before the defendant can be compelled to put in an answer might, in many cases, be productive of irreparable injury to the plaintiff, by affording an opportunity for the performance of the act intended to be restrained, before the injunction can be issued to prevent it. Indeed, in some cases, the mere act of giving notice, to the defendant, of the intention to make the application, might be, of itself, productive of the mischief apprehended, by inducing him to accelerate the act in order that it may be complete before the time for making the application shall have arrived. To obviate these inconveniencies, the Court has adopted the practice of granting injunctions, before answer, upon affidavits verifying the plaintiff's case, and shewing the grounds he has for apprehending that an act is about to be committed, which, if not prevented, will be productive of injury which the Court considers as irreparable; and it will also, in cases where there either is not time to give notice, or there is reason to apprehend that the giving notice of the application would lead to the performance of the act to be prohibited, award the injunction without notice, or even before service of the *subpœna*.

The most usual case in which special injunctions are granted upon affidavit, before answer, are those of waste, or nuisance, by obstructing ancient lights, or trespass. The Court will *also grant an injunction before answer, to restrain any of those acts, the performance of which, before the

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(*e*) *Ante*, p. 290; *et vide* Smythe v. Smythe, 1 Swanst. 252. The rule, however, is liable to exception in the case of injunctions to restrain waste, and matters analogous to waste, and in cases of partnership to shew mismanagement, &c.; *vide post*, p. 356.

(*i*) Morphett v. Jones, 19 Ves. 351.

(*k*) Goodman v. Whitcomb, 1 J. & W. 589.

(*l*) Glassington v. Thwaites, 1 S. & S. 134.

defendant's time for answering is expired, would either defeat the object of the suit or cause serious injury or inconvenience to the party applying.

Thus it will prevent the printing of books, or the infringement of a copyright on the filing of a bill; but, in such cases, as the equitable relief entirely flows from the legal right, the application must be supported by an affidavit of title; (*m*) and, in the case of a patent, it is incumbent on the party making the application to swear as to his belief, at the time of making the affidavit, that the invention was new or had never been practised in this kingdom at the date which the patent bears. (*n*)

The Court will likewise enjoin, *ex parte*, the negotiation of a bill of exchange, where it has been fraudulently or improperly obtained, or if it is absolutely void in its creation; for, as it would be a good bill of exchange, and, therefore, a negotiable instrument in the hands of a *bonâ fide* holder, the plaintiff has a right to be protected from that danger, and the mischief attending it. (*o*) Thus, also, it will prevent the personal representative of a testator from receiving his assets when he is either insolvent, or wasting the property in such a manner that there is a great danger of its being lost, although it is admitted that to induce the Court to interfere against an executor, and especially before answer, a strong special ground must be made. (*p*) An injunction will likewise be ordered, before appearance, to restrain a vendor who has contracted to sell his property to another, from conveying away the legal estate in the premises, because the plaintiff might be put to expense by the necessity of making another party when the cause was just ready for hearing; (*q*) and the Court has, moreover, as we have *seen, granted an injunction, before answer, to restrain [*348] the trustees of a Presbyterian chapel, from employing or permitting any person, who was not a licentiate or ordained minister of the Church of Scotland, to preach or officiate in the chapel. (*r*)

It may be observed here, that injunctions to restrain proceedings at law, will not, in general, be granted specially upon affidavit before answer; the proper course, where the defendant bringing the action does not, by putting in his answer, afford the plaintiff an opportunity of obtaining the common injunction, is, to move for the injunction upon the answer; and the rule that a special injunction, in such cases, will not be granted before answer, has been extended to cases in which an action has been brought by assignee of a bond or other *chose in action*, in the name of the assignor; in such case, the Court will not grant a special injunction, against the assignee, to restrain the action, but the plaintiff must wait till the assignor is in contempt, or has answered; (*t*) though, it seems, from the decision of Lord Lyndhurst, in *Montague* v. *Hill*, (*u*) that, where a common injunction has been obtained, the answer of the assignor cannot be read in opposition to a motion to dissolve the injunction made by the assignees.

Special injunctions to restrain proceedings at law, will also be refused where the sole ground for the application is, that the plaintiff at law will otherwise be entitled to sue out execution before the common injunction can be obtained. (*x*)

(*m*) Platt v. Button, 19 Ves. 447; *ante*, p. 326.

(*n*) Hill v. Thompson, 3 Mer. 624; Sturz v. De la Rue, 5 Russ. 328; *ante*, p. 326.

(*o*) Smith v. Haytwell, Amb. 66; Hood v. Aston, 1 Russ. 412; Lloyd v. Gurdon, 2 Swanst. 180.

(*p*) Middleton v. Dodswell, 13 Ves. 266; Mansfield v. Shaw, 3 Mad. 100.

(*q*) Echliff v. Baldwin, 16 Ves. 267.

(*r*) Milligan v. Mitchell, 1 M. & K. 446; *ante*, p. 335.

(*t*) Lord Portarlington v. Graham, 5 Sim. 417.

(*u*) 4 Russ. 128; *vide etiam* Thorpe v. Hughes, 3 M. & C. 742, *ante*, p. 382; this motion may be special, *ante*, p. 286.

(*x*) Franklyn v. Thomas, 3 Mer. 225.

In cases, however, where the plaintiff has had no opportunity of obtaining the common injunction, a special injunction, to restrain proceedings at law, may be obtained, before answer, upon affidavit verifying the facts of the case; thus, where an application was made for an injunction before answer to restrain the issuing of execution, under a warrant to confess judgment on a bond, part of the consideration of which was, the defendant's returning, as cash, a *post obit* security formerly granted by the plaintiff, who was an expectant heir, in discharge, *of a debt of inconsiderable amount, upon the understanding that the principal was not to be called for till the death of the plaintiff's father; Lord Eldon, upon affidavit of these facts, it being vacation and no *subpœna* returnable till next term, granted the injunction, upon the plaintiff's undertaking to serve the defendant with immediate notice, with liberty to the defendant to apply during the continuance of the sittings. (*y*)

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So where the Court in which the action is brought has a practice which renders it impossible for the defendant at law to obtain the common injunction in sufficient time to answer any useful purpose, (*z*) special injunctions have, as we have already seen, been granted upon affidavit to restrain further proceedings. (*a*) This has also been done to restrain proceedings at law in an outlawry, where the plaintiff in equity had received no notice of the action, and had not, therefore, an opportunity of obtaining the common injunction. (*b*)

It is to be observed, however, that although the Court will, in cases where the plaintiff in equity could have had no opportunity of obtaining the common injunction, relax its rule, and grant an injunction to restrain a proceeding at law against him upon affidavit before answer, it will not do so where the plaintiff in equity, having had notice of the proceeding at law, might have placed himself in a situation which would have entitled him to apply for the common injunction: thus where an ejectment was brought against the tenant of the plaintiff in equity, of which the plaintiff had notice, but omitted to make himself a party to defend the ejectment, (which he might have done by rule of the Court in which the ejectment was brought,) Lord Eldon refused to grant an injunction, *ex parte*, to restrain the defendant from taking out execution on the judgment which he had obtained in the ejectment against the tenant, on the ground that the plaintiff, as landlord, might have made himself a party to the ejectment, and then have obtained the injunction in the ordinary way; and that, if he were to grant *such an injunction, it would lead to this practice, viz:—"that the landlord, if convenient to him, would not make himself a defendant to the action, but would wait till it was over, and then apply for an injunction upon affidavit." (*c*)

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Where a special injunction is applied for before answer, the application must be made by *motion;* it is stated, however, in some of the books, that if the application be made in vacation, when the Court does not sit, as no motion can be made, a Judge of the Court may grant the application upon petition; (*d*) this, however, is not universally the case in practice, as, although applications for injunctions during vacation, are sometimes made upon petition, the more common course is to apply by motion, supported by affidavit of the plaintiff's title, and of the facts from which he is induced to apprehend that the act to be restrained is about to be committed; and producing, at the same time, a certificate of the bill having been filed and duly signed by the Clerk in Court.

(*y*) Annesley v. Rookes, ib. 226, n. (*z*) Hine Fiddes, 2 S. & S. 370.
(*a*) Jones v. Basset, Bevan v. Reid, 2 Russ, 405.
(*b*) Drummond v. Pigou, 2 M. & K. 169. (*c*) Moses v. Lewis, Jac. 502.
(*d*) Eden on Inj. p. 320; Prac. Reg. 252; Smith v. Clarke, 2 Dick. 455; Nichols v. Kearsley, ib. 645; Chamberlayne v. Dummer, 1 Bro. C. C. 166.

An affidavit in support of an application for a special injunction before answer, is usually sworn by the plaintiffs or some of them, but may be sworn by any person acquainted with the facts: (*e*) thus an injunction was granted to restrain the publication of a work sold as the plaintiff's, upon affidavit by the plaintiff's agent, the plaintiff himself being abroad. (*f*)

The affidavit must also be sworn *after* the bill is filed, otherwise it cannot be read, not having been made in a cause; and it seems that the office copy of the affidavit must also be in Court at the time when the injunction is moved for; and, in a recent case, the Vice Chancellor discharged an injunction, on the ground, that the office copies of the affidavits, upon which it was granted, were not actually in Court when the order was pronounced. (*h*)

*As to the contents of the affidavits to obtain an injunction, it is in general necessary that a plaintiff should swear positively to his title. An injunction has been refused where a plaintiff merely swore, upon his *information and belief*, that he was a remainder-man under a settlement. (*i*) An averment that the plaintiff is entitled in fee simple has also been considered insufficient, as being *too general;* he must set out his title *particularly*, (*k*) and if the plaintiff's right appears to be *doubtful* the Court always refuses to interfere. (*l*) [*351]

Upon the same principle it is, as we have seen, (*m*) required that, upon an *ex parte* application to restrain the violation of a patent right, the plaintiff should swear as to his belief at the time of *making the application*, (and not as to his belief at the time he obtained the patent,) that he is the original inventor. (*n*) So upon a bill to restrain an infringement of copy-right, by an assignee of the author, the plaintiff (since the recent determinations at law,) must show that the assignment was in writing; though, if he is the assignee of an assignee, it will be sufficient to state the assignment under which he himself claims, without producing the assignment to his assignor.

The plaintiff should also, by his affidavit, state some actual violation of his rights or a sufficient ground to apprehend it; thus, in cases of waste, an affidavit merely as to his apprehension or belief that the defendant intends to commit waste, without stating any grounds for it, will not be sufficient; there must either be some fact, like the marking trees, sending a surveyor, or some threat. (*o*)

*Strictly speaking, *after appearance* by the defendant, an injunction ought not to be ordered, unless upon notice; but in cases of urgency this will not be required; (*p*) and, in *Aller* v. *Jones*, (*q*) Lord Eldon said, that if a person about to commit waste, and against whom a bill was filed, could, by appearing the evening before the motion, prevent it, he would get two [*352]

(*e*) 1 Smith, 595. (*f*) Lord Byron v. Johnston, 2 Mer. 29.
(*h*) Jackson v. Cassidy, V. C. 15 June, 1841, *ex relatione, et vide ante*, p. 241.
(*i*) Davis v. Leo, 1 Ves. 784. (*k*) Whitelegg v. Whitelegg, 1 Bro. C. C. 57.
(*l*) Field v. Jackson, 2 Dick. 599; Rotheram v. Fanshaw, 3 Atk. 628.
(*m*) *Ante*, p. 326; but in Lord Byron v. Johnston, 2 Mer. 29, where the plaintiff was abroad, and an injunction was applied for on his behalf, by his agents, to restrain the publication of a book, in his name, the Court granted the injunction, upon the affidavit of the agent, who did not swear positively that the plaintiff was not the author of the book, but stated circumstances which made it highly probable that he was not, the defendant (who was served with the notice of the application,) refusing to swear to his belief that it was so.
(*n*) Hill v. Thompson, 3 Mer. 624.
(*o*) Gibson v. Smith, 2 Atk. 182; Barnard, 491, S. C.; Jackson v. Cator, 5 Ves. 688; Hanson v. Gardiner, 7 Ves. 309; Etches v. Lance, ib. 417; Hannay v. M'Entire, 11 Ves. 54.
(*p*) Marasco v. Bilton, 2 Ves. 112; Harrison v. Cockerell, 3 Mer. 1; Collard v. Cooper, Mad. & Geld. 190. (*q*) 15 Ves. 605.

days for cutting timber. In *Perry* v. *Weller*, (*r*) a distinction appears to have been recognized between a *gratis* appearance and an appearance entered upon service of a *subpœna*; it seems, however, that, where the threatened mischief is imminent and would be irremediable, the Court has not required notice, even though the appearance had been the consequence of a *subpœna*. (*s*)

It is not often, however, that, where an injunction is required to prevent irreparable mischief, a defendant has an opportunity of appearing before the order can be made, the usual practice being to apply for the injunction before the *subpœna* is issued, and immediately upon the filing of the bill, (of which a certificate, signed by the Clerk in Court, must be produced at the time of the application;) in which case, upon its being shewn to the Court, by affidavit, that the case is urgent and the injury likely to be irreparable, an order will be made for the injunction directing the *subpœna* to be served at the same time with the writ. This practice has been long adopted in cases of waste, or of piracy, or of infringement of patents, and has been extended to restrain the negotiation of bills of exchange, or other negotiable instruments. (*t*)

[*353] It has also been acted upon in cases of obstruction of ancient *lights, (*u*) and in many other cases, where the danger to the interest of the party applying was imminent: thus where a foreign vessel was driven into Plymouth by stress of weather, Lord Eldon, at the instance of the supercargo and part owner, granted an injunction to prevent the master from selling the ship's cargo, &c., till answer or further orders, upon an affidavit that he had heard the captain was about to do so, and on certificate of bill filed. (*x*) In *Williams* v. *Williams* (*y*) an injunction was granted, in like manner, to restrain the proprietor of a coach, who had sold the goodwill of his business and undertaken not to set up another coach on the same road, from running a coach contrary to his undertaking.

So also, where the representatives of a mortgagor had obtained the mortgage deeds from the mortgagee, by fraud, Lord Eldon, upon affidavit and certificate of bill filed, granted an injunction to restrain the defendants from selling or mortgaging the estate, and ordered the deeds to be brought into Court immediately. (*z*)

It sometimes happens that, upon an application *ex parte* for an injunction, the Court will, if it thinks that the case is so urgent as to require its immediate interference, or that the affidavits in support of it are not positive enough, order notice of the application to be given to the defendant. (*a*) In such cases, if the defendant has not appeared, the notice of motion must express that leave has been obtained of the Court to serve it. (*b*)

There appears to have been, formerly, some doubt as to the propriety in cases of *ex parte* injunctions directing the *subpœna* to be served with the injunction, and the practice seems to have been both ways. (*c*) The rule,

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(*r*) 3 Russ. 519.

(*s*) *Vide* Acraman v. Bristol Dock Company, 1 R. & M. 321, and the cases there cited *notis*.

(*t*) Patrick v. Harrison, 3 Bro. C. C. 476; —— v. Blackwood, 3 Anst. 851; Smith v. Haytwell, Ambl. 66. Lord Eldon held that the same principle prevails where a plaintiff, having obtained the common injunction to restrain proceedings at law on such an instrument, moves, upon affidavit, to extend the injunction to prevent its negotiation; and that, in such cases, notice of the application is unnecessary, since the very intimation might produce the mischief apprehended, and the instrument get into the hands of a *bonâ fide* holder for valuable consideration. *Vide* Mr. Belt's Edn. of Brown's C. C. vol. 3, p. 477, n. 4.

(*u*) Atty. Gen. v. Nichol, 16 Ves. 338; 3 Mer. 687, S. C.; Back v. Stacy, 2 Russ. 121.

(*x*) Delafield v. Guanabens, M. S. 26 March, 1809.

(*y*) 2 Swanst. 253. (*z*) Wallis v. Willes, November, 1802.

(*a*) *Vide* Ld. Byron v. Johnston, 2 Mer. 29.

(*b*) *Ante*, p. 255. (*c*) *Vide* Atty. Gen. v. Nichol, *ubi supra*.

however, is now settled, and the service of the *subpœna* is invariably required to be made at the same time that the injunction is served, and it is said, that the Court generally *directs that, when the service takes place, the party shall be apprised that he is at liberty to apply for a dissolution of the injunction, as he may be advised. (*d*) [*354]

The orders pronounced by the Court in cases of special injunctions before answer, have varied at different periods. (*e*) The form most frequently adopted enjoined the party "*till further order.*" (*f*) In some cases, the injunction has been till "*appearance* and further order;" (*g*) in others till "*answer* and further order." (*h*) But the form at present used, and which is established by a rule laid down by Lord Eldon, is "till answer *or* further order." This has been adopted as giving defendant the liberty to move if necessary, to dissolve upon affidavit, before he has answered the bill; and it may be observed, that although, in cases of waste and trespass, the bill and notice of motion should pray an injunction against the defendant only, it is invariably extended, by the order, to his servants, agents, and workmen. (*i*)

An order for a special injunction, having been obtained, must be drawn up, passed, and entered in the same manner as any other order. It frequently happens, however, (especially if the order is made in vacation, when the offices are closed,) that the matter is so urgent that the object of the injunction might be defeated if the party were bound to wait till the order could be passed and the writ issued upon it; in such cases, the practice is to serve the party *personally* with notice, in writing that the injunction has been ordered, and that it will be sealed and served as soon as it can be passed through the offices, or else to procure a transcript of the minutes of the order signed by the Registrar, and to serve the same personally by delivering *a copy of it, shewing, at the same time, the original transcript so signed; and either the notice or the copy of the minutes will be sufficient to render the defendant guilty of a contempt if he acts in opposition to the injunction. (*k*) In such case, however, there must be no delay in endeavouring to get the order drawn up and the injunction under seal, and serving it when obtained. (*l*) [*355]

A special injunction is prepared, sealed, and served, in precisely the same manner as a common injunction.

Formerly where special injunctions were granted "till answer *and* further order," they might be dissolved like the common injunction by an order *nisi*, on the coming in of the answer, (*m*) or by an original motion on the coming in of the answer, without an order *nisi;* (*n*) but, since special injunctions have been granted "till answer *or* further order," the defendant may either apply to dissolve it, before answer, (*o*) or he may wait till his answer has been put in

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(*d*) *Vide* Bro. C. C. ed. Belt. 477, n. 2.

(*e*) It is said, in Cary, to have been usual to grant injunctions on surmises, with a proviso *si ita sit*. Fodringham v. Chomely, Cary, 53; Aschughe v. Shelton, ib. 56.

(*f*) Lane v. Newdigate, 10 Ves. 192.

(*g*) Lord Grey De Wilton v. Saxon, 6 Ves. 106.

(*h*) Potter v. Chapman, 1 Dick. 146; Robinson v. Lord Byron, 1 Bro. C. C. 588; 2 Dick. 703. It is by mistake stated, in Mr. Coxe's Report, to have been till "answer *or* further order," Reg. Lib. B. 1784, fol. 143; Drury v. Molins, 6 Ves. 328; Lord Tamworth v. Lord Ferrers, ib. 419.

(*i*) Humphreys v. Roberts, cited Seton on Decrees 305; Chamberlayne v. Dummer, ib. 306; Mount v. Fenner, ib. 310; Bainbridge v. Briggs, ib. 311; Jefferys v. Bowles, ib. 312.

(*k*) Vansandau v. Rose, 2 J. & W. 264; 1 Smith, 598.

(*l*) Vansandau v. Rose, *ubi supra*.

(*m*) Seton on Decrees, 314; *et vide* Countess of Strathmore v. Bowes, 2 Dick. 675; Trusler v. Cummings, L. C. 28 April, 1773, R. L. B. 1772, fo. 432.

(*n*) Seton on Dec. 314; Norton v. Aylett, ib.; Mount v. Turner, 2 Dick. 793.

(*o*) Vipan v. Mortlock, 2 Mer. 479; Earnshaw v. Thornhill, 18 Ves. 488.

before he takes that step, in which case he may do so without a previous order *nisi*. (*p*)

In either case, however, he must proceed by special motion, the rule of the Court being that an injunction cannot be dissolved, unless upon motion in open Court. (*q*)

In term time, notice of such a motion may be given for any day, without special leave, though, when it is wished to make it on a day not appropriated to the hearing of motions, it is usual, previously, to ask the leave of the Judge to bring it on on that day. When the motion is to be made during the sittings after term, if it be important that it should be made without waiting for a seal day, application should be *made to the Court, before the notice of motion is served, for permission to give the notice of motion for a particular day, and the fact of such permission being given should be mentioned in the notice of motion. (*r*)

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Where the application to dissolve an injunction is made before answer, it must be supported by affidavits on the part of the defendant in answer to those upon which the injunction was obtained, and the case, thus made by the defendant, may be met by counter affidavits on the part of the plaintiff, (*s*) and, upon hearing the motion, the Court will judge between them. But, if the defendant has filed his answer, then it is a general rule that no affidavit can be read to contradict it; for, when the answer denies all the circumstances upon which the equity is founded, it is thought advisable, and it has become the universal practice with reference to an injunction, to give credit to that answer, and that is carried so far that though 500 affidavits were filed, not only by the plaintiff, but by many witnesses, not one could be read as to that purpose. (*t*) The rule, therefore, is, that, *for the purpose either of obtaining or continuing an injunction, no affidavit shall be read in opposition to the answer.* (*u*) The answer, however, must be *a full answer*, and, where a defendant had submitted to exceptions, the plaintiff was permitted to read affidavits filed by him since the putting in of the answer, although the defendant had put in a further answer after he had given notice of the motion to dissolve. (*x*)

The rule, however, is liable to exception in the case of injunctions to restrain waste. In these cases, the Court will admit affidavits to be read after answer on the part of the plaintiff to prove acts of waste committed, even where they are denied by the answer; (*y*) although it will not permit them in *support of the plaintiff's title where it is controverted by the defendant. (*z*)

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This exception from the general rule has been extended to cases analogous to waste, (*a*) and to cases of partnership, to shew mismanagement or exclusion. (*b*) It will not, however, extend to the admission of affidavits to support injunctions

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(*p*) Countess of Strathmore v. Bowes, *ubi supra*.

(*q*) Eden on Injunc. 326. Occasionally, however, in pressing cases, the Lord Chancellor has appointed a special hearing at his house for the purpose; ib.

(*r*) *Ante*, p. 255.

(*s*) But as to reading counter affidavits in reply, *vide ante*, p. 260.

(*t*) Clapham v. White, 8 Ves. 36.

(*u*) See Sir S. Romilly's argument in Norway v. Rowe, 19 Ves. 150.

(*x*) Smith v. Cleasby, 10 Sim. 91.

(*y*) Countess of Strathmore v. Bowes, 2 Bro. C. C. 88; 1 Cox. 263. S. C.; 2 Dick. 673, S. C.; Robinson v. Byron, 1 Bro. C. C. 588; Potter v. Chapman, Amb. 99; Gibbs v. Cole, 3 P. Wms. 255; Norway v. Rowe, 19 Ves. 153.

(*z*) Norway v. Rowe, *ubi supra*; Strathmore v. Bowes, 2 Dick. 673; *vide etiam* Smythe v. Smythe, 1 Swanst. 252.

(*a*) Peacock v. Peacock, 16 Ves. 49; Charlton v. Poulter, 19 Ves. 148 n; Norway v. Rowe, 19 Ves. 144.

(*b*) Norway v. Rowe, *ubi supra*.

for restraining the negotiation of bills of exchange; (c) nor will it extend to permit the reading of affidavits as to *facts* which are neither admitted nor denied by the answer, (d) although it has, as we have already seen, been long settled that the Court will go so far as to admit affidavits to be read to verify documents set forth in the bill, where the defendant, by his answer, has neither admitted nor denied them. (e)

If, upon hearing the motion to dissolve the injunction, the Court is of opinion that it was improperly granted, or that the case made by the plaintiff is contradicted or not supported, it will order the injunction to be dissolved either with or without costs, as the justice of the case may appear to require. But if the defendant does not succeed in satisfying the Court, that the injunction ought either to have been refused, or that it ought not to be continued, it will direct it to be continued until the hearing. And it is to be observed that if, in the case of an injunction to restrain waste, or any thing of that description, the answer admits that the defendant has committed waste, or has threatened to commit it, the injunction will be continued till the hearing. (f)

It frequently, however, happens that, upon hearing the motion to dissolve the injunction, the Court is not satisfied with respect to the right of the plaintiff to maintain his injunction; in such cases, if the doubt arises upon the facts of the case, it *will direct an inquiry by the Master, or an issue, (g) [*358] or an action at law, (h) or, if the doubt arises upon the law, it will direct a case to be sent for the opinion of a Court of Law. (i) In such cases, the Court usually dissolves the injunction, and, if the nature of the subject admits of it, as in the case of a piracy of a literary work or the infringement of a patent, it will direct an account to be kept, by the defendant, of the profits arising to him from the sale of the work, or of the article the sale of which is alleged to be an infringement of the plaintiff's right.

The reader is reminded, that where an injunction is dissolved, with liberty to the plaintiff to bring an action at law, and the defendant, in the meantime, undertakes to keep an account, if the result of the action is favourable to the plaintiff, he may, in general, when the cause comes on for hearing, have a decree for an account against the defendant, provided he was entitled to the account when he filed his bill, and framed his bill accordingly. But where he was not entitled to an account when the bill was filed, and the bill is not framed with a view to such account, as where the right to an account has arisen entirely from the defendant's undertaking to keep one, he cannot have a decree for such account without filing a supplemental bill. (k)

It is to be remarked that, although the bill seeks merely an injunction, or an injunction with an account consequent upon the injunction, and the result of a reference to a Master, or of an issue, or action at law, or of a case for the opinion of a Court of Law, is unfavourable to the plaintiff's right to the injunction, the defendant cannot on that ground move to dismiss the bill. In *Brooke* v. *Clarke*, (l) a motion of this nature was attempted, after a case at law had been certified against the defendant, but Lord Eldon refused it, saying that upon the certificate from the Court of Law the case stood as if he had declared his

(c) Berkeley v. Brymer, 9 Ves. 355.
(d) Barrett v. Tickell, Jac. 154; Castellain v. Blumenthall, 10 L. J. tit. Ch. 223; *et vide ante*, p. 290.
(e) Taggart v. Hewlett, 1 Mer. 499; Hodgson v. Dean, 2 S. & S. 221; *et ante*, p. 290.
(f) Packington v. Packington, 1 Dick. 101; Atty. Gen. v. Burrows, ib. 128; Anon. 3 Atk. 485.
(g) *Vide ante*, vol. 2, p. 735.
(h) Ib. 762.
(i) Ib. 766.
(k) *Vide ante*, p. 157.
(l) 1 Swanst. 550.

own opinion to the effect that the plaintiff could not succeed in his motion for
[*359] an injunction, and *that the cause might still be brought to a hearing when the person who should preside might entertain a different opinion upon the title.

It is to be remarked, also, that although an injunction may be granted *ex parte* and sustained upon a motion to dissolve it, yet if, at the hearing of the cause, there be no evidence against the defendant, the bill will be dismissed. (*m*)

It is to be recollected that, after a special injunction has been granted upon affidavit of merits, it is a matter of course to obtain leave to amend the bill "without prejudice to the injunction," unless the bill has been already amended, in which case the order to amend must be obtained in the manner already pointed out. (*n*)

SECTION IV.

Of continuing or granting Injunctions at the Hearing.

It frequently happens that where an injunction has been obtained before the hearing, upon an interlocutory application, it will be continued by the decree made at the hearing of the cause. (*a*)

Injunctions are continued at the hearing either *provisionally* or *permanently*. They are frequently continued provisionally pending a reference to the Master to make inquiries or to take an account preparatory to a final adjudication upon further directions. (*b*)

Injunctions are permanently continued or made perpetual by the decree in those cases where the party enjoined is in possession of some instrument con-
[*360] ferring a legal right, which it *is contrary to equity that he should be permitted to exercise to the detriment of the plaintiff.

Therefore, where the plaintiff gave to the defendant three promissory notes for a particular purpose, on his undertaking to make no improper use of them, but afterwards the defendant, contrary to his promise, put the notes in suit against the plaintiff, who thereupon filed a bill praying that the notes might be delivered up to be cancelled, and that the defendant might be restrained, by injunction, from proceeding upon them, the Court, at the hearing, directed that a perpetual injunction should issue, and that it should extend to restrain the indorsing and further negotiation of the notes. (*c*)

It is to be remarked, however, that the general course of the Court, where a party is in possession of a security or other instrument, which it is against conscience that he should use against the defendant, is to direct it to be delivered up and cancelled; a course which it will even adopt where the instrument is void in law, although it has been sometimes doubted whether this remedy is applicable to cases of this description, as the circumstances which render the

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(*m*) Barfield v. Kelly, 4 Russ. 355.
(*n*) *Vide ante*, vol. 1, p. 531.
(*a*) Seton on Dec. 300.
(*b*) Old v. Old, ibid.
(*c*) Chennel v. Churchman, and Minshaw v. Jordan, Rolls, cited 3 Bro. C. C. 16; *et vide* ibid. ed. Belt, n.; *vide etiam* Hannington v. Du Chatel, 1 Bro. C. C. 124; 2 Dick. 581, S. C.; 3 Woodeson Sect. 459 n. S. C.; as reported in 2 Swanst. 159 n.

instrument void at law might be shewn or pleaded there to any action which might be brought upon such an instrument. (*d*)

The practice of extending injunctions at the hearing so as render them perpetual, is not confined to cases in which the parties are in a position to annoy the plaintiff, by proceedings which he may have a legal right to institute, but it is applied to prevent a continuation or repetition of acts for which the party has no legal authority whatever; thus, injunctions to restrain waste or the infringement of a patent may be made perpetual at the hearing. So also, may injunctions to restrain the piracy of a publication, (*e*) or to restrain *the [*361] use by one trademan of the trade marks of another. (*f*)

It is to be observed, that, to support a decree for a perpetual injunction, the Court requires that there should be nothing like a doubt in the case, and that, in *Whittingham* v. *Wooler*, (*g*) where the defendant had, in two numbers of a periodical publication of theatrical criticism, inserted detached extracts, to the amount of six or seven pages, from a farce, the property of the plaintiff, containing forty pages, which were interspersed with criticisms, Sir W. Grant, M. R., considered the question, whether the defendant had transgressed the allowed limits of fair extracts, too doubtful to warrant the Court in making a decree for a perpetual injunction, and dismissed the bill with costs. (*h*)

It may be noticed, in this place, that, in order to entitle a plaintiff to a decree for a perpetual injunction at the hearing, it is not absolutely necessary that he should previously have obtained one upon interlocutory application, and that, though he may have failed, upon the answer of the defendant to obtain or support his injunction, he is at liberty to claim it at the hearing; (*i*) and the case will be the same though he may not have made any application for an interlocutory injunction. (*k*)

But the not having moved for an injunction imposes on the plaintiff, in such case, the obligation of making out a clear and unexceptionable title at the hearing, and, if he fails in that and has not previously obtained an injunction, he will not be allowed to use the facts proved in the cause as evidence of a *primâ facie* case giving him a right to further time, for the *purpose of [*362] enabling him to establish more satisfactorily his legal title. Upon this principle, Lord Langdale, M. R., acted in *Bacon* v. *Spottiswoode*, (*m*) before referred to, in which case a patentee brought the cause to a hearing, without having previously moved for an injunction, and his Lordship was of opinion that, on the evidence then produced, an injunction would not have been granted on an interlocutory application, and, upon that ground, refused to retain the bill for the purpose of giving the patentee an opportunity of establishing his right at law, but dismissed it with costs. The same case afterwards came before Lord Cottenham, upon appeal, (*n*) when his Lordship confirmed the judgment

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(*d*) *Vide* 2 Swanst. 157 n. where all cases on this subject are collected.

(*e*) Macklin v. Richardson, Amb. 696; Seton on Decrees, 315, S. C.; Mantey v. Owen, 4 Burr. 2329, was brought to a hearing, and a perpetual injunction decreed, *vide* 13 Ves. 502. The case of Gay's works, in 1837, is also mentioned as one in which the injunction was made perpetual, 1 Bl. 308. In Millar v. Taylor, 4 Burr. 2303, 2417, Mr. Justice Willes remarked that, for sixty years before that time, there had not been more than two or three causes of this description brought to a hearing, the reason which he states to be—that if the injunction is acquiesced in, it is seldom worth the plaintiff's while to go for the account, ib. 2324.

(*f*) Millington v. Fox, 3 M. & C. 338. (*g*) 2 Swanst. 428 n.

(*h*) *Vide etiam* Baily v. Taylor, 1 R. & M. 73.

(*i*) Ibid. 76.

(*k*) Bacon v. Spottiswoode, 1 Beav. 383; Bacon v. Jones, 4 M. & C. 433. S. C.

(*m*) 1 Beav. 383. (*n*) 4 M. & C. 433.

of the Master of the Rolls. In his judgment upon that occasion, the Lord Chancellor observed that, "generally speaking, a plaintiff who brings his cause to a hearing is expected to bring it on in such a state as will enable the Court to adjudicate upon it, and not in a state in which the only course open is to suspend any adjudication until the party has had an opportunity of establishing his title by proceedings before another tribunal. And I think the Court would take a very improper course if it were to listen to a plaintiff who comes forward at the hearing and asks to have his title put in a train for investigation without stating any satisfactory reason why he did not make the application at an earlier stage. When he comes forward upon an interlocutory motion, the Court puts the parties in the way of having their legal title investigated and ascertained, but, when a plaintiff has neglected to avail himself of the opportunity thus afforded, it becomes a mere question of discretion how far the Court will assist him at the hearing or whether it will then assist him at all. If, indeed, any circumstances had occurred to deprive him of that opportunity, in the progress of the cause, the question might have been different; but, in this case, I have not heard any reason suggested why the plain and ordinary course was not taken by the plaintiffs, of previously establishing their rights at law. They might have brought
[*363] their action before filing the bill, or *they might, after the bill was on the file, have had their right put in a train for trial. Instead of that they have allowed the suit to remain perfectly useless to them for the last four years. They knew of the alleged infringement in the month of *August*, 1835; and from that time till the hearing there was no moment at which they might not, by applying to the Court, have had liberty to bring an action to establish their title at law. It is obvious that such a line of proceeding exposes a defendant to inconveniences which are by no means necessary for the protection of the plaintiff. It is no trifling grievance to a defendant to have a chancery suit hanging over him for four years, in which, if the Court shall so determine at the hearing, he will have to account for all the profits he has been making during the intermediate period. Is a defendant to be subject to this annoyance, without any absolute necessity, or even any proportionate advantage to his adversary, and without that adversary being able to shew any reason why he did not apply at an earlier time? It appears to me that it would be very injurious to sanction such a practice, more especially when I can find no case in which the Court has thought it right to retain a bill simply for the purpose of enabling a plaintiff to do that which these plaintiffs might have done at any time within the last four years. It was much more regular and proper that the plaintiffs should have taken steps for putting the legal right in a course of trial. Those steps they have not chosen to take, and it is now impossible to put the defendants in the same position in which they would have stood if such a course had been originally adopted."

It is to be observed that the principles laid down in the above case will not, of course, apply to those cases in which the Court only grants injunctions at the hearing of the cause, as in the case of bills to restrain the setting up of outstanding terms, and others of that description.

It may be mentioned here, that, if an injunction has been obtained upon an interlocutory order, and it is intended to continue it, at the hearing, care must
[*364] be taken to introduce a direction *to that effect in the decree, otherwise it will not be supported. (*o*)

With respect to the cases in which the Court will decree perpetual injunctions at the hearing of the cause it may be mentioned that if a decree has been made for the performance of trusts, the defendant will be perpetually enjoined from

(*o*) Seton on Decrees, 300.

setting up a legal estate in order to overturn it. (*p*) So if a will is established against an heir who suffers the bill to be taken *pro confesso* against him, (as that, in effect, is confessing he has no claim,) and if he permits the decree or order by which he is excluded to be made absolute, (which is, in effect, admitting that if he had any claim he was thereby abandoning it,) the Court will enforce that decree or order until it be duly reversed; and it will grant, for that purpose, a perpetual injunction. (*q*)

Perpetual injunctions will also be decreed where the same question has been frequently litigated in the same manner, or where it is likely to be contested in a multiplicity of suits. This is the foundation for a bill of peace where it is necessary to quiet the rights after repeated ejectments, for such a proceeding, unless prevented, would become oppressive to the opposite party, (*r*) or, where there is one general right to be established against a great number of persons, as the right of a parson against his parishioners for tithes, or the right of parishioners against a parson for his modus, or the rights of a lord of the manor against his tenants for encroachments, or the right of the tenants against the lord for disturbance; for, as the difficulties would be insuperable if each of the parties should attempt to determine their particular rights by separate and distinct actions, the Court will put the whole in peace by a perpetual injunction. (*s*)

It is to be observed that an injunction is never made perpetual [*365] *but upon the hearing of the cause; (*t*) when, however, it is once made perpetual, it seems to be so far final, as to remain in force notwithstanding the death of the party; for, if it were necessary to revive upon every abatement, that would be, in effect, a perpetual suit. (*u*) With regard to injunctions which are not perpetual or have not been made so by decree, they, also, continue in force notwithstanding the suit has abated, and the ordinary course, in such cases, for the party enjoined, if he wishes to get rid of the injunction, is to move that the plaintiff, or his personal representative, may revive within a given time, or else that the injunction may be dissolved. (*x*)

SECTION V.

Of the Consequences of a Breach of an Injunction.

Before we proceed to the consideration of the method of vindicating the authority of the Court, in cases where it has been impugned by a breach of its injunction, it is necessary that we should consider what the effect of an injunction is, and upon whom it will be binding.

(*p*) Askew v. Poulterers' Comp. 2 Ves. 90; Buckingham v. Buckingham, 2 Eq. Ca. Ab. 527.

(*q*) Selby v. Selby, 2 Dick. 678.

(*r*) Leighton v. Leighton, 1 P. Wms. 671; 1 Str. 404; 4 Bro. P. C. 378; Devonsher v. Newenham, 2 Sch. & Lef. 211; Bath, Earl of, v. Sherwin, 10 Mod. 1; 4 Bro. P. C. 373.

(*s*) Lord Tenham v. Herbert, 2 Atk, 483; Mayor of York v. Pilkington, 1 Atk. 282; Conyers v. Lord Abergavenny, ib. 285.

(*t*) For. Rom. 194.

(*u*) Askew v. Townsend, 2 Dick. 471, cited 3 Ves. 197, sub nom: Ascough v. Townshend.

(*x*) *Ante*, p. 205.

We have already seen, (*a*) that, in the case of a common injunction, where a *declaration has not been delivered*, the injunction restrains *all proceedings whatever;* the principle being, that the Court, in favour of personal liberty, will not permit the plaintiff at law, while under the imputation of *laches* for not putting in his answer, to take the person of his debtor immediately; (*b*) but *where the declaration has been delivered*, the plaintiff at law may proceed to trial, the injunction then *staying execution* only. (*c*)

This distinction arises from the construction which has been given to the [*366] following clause, which is always inserted at the *end of the writ which issues in the Court of Chancery—"*But, nevertheless, the said defendant is at liberty to call for a plea, and to proceed to trial thereon; and, for want of a plea, to enter up judgment, but execution is hereby stayed.*" (*d*) It has been contended, that, by virtue of this proviso, the delivery of a declaration is no breach of the injunction; and Lord Macclesfield observed, that, if it had not been for some resolutions to the contrary, he should have thought so, since, by the very terms of the order, the plaintiff is at liberty to proceed to trial; and the delivery of the declaration, &c. is an incident, without which there can be no trial. (*e*) The construction, however, has always been, that it only applies to a person *in a condition to demand a plea;* and that if the action at law has not been commenced, or the declaration has not been delivered, when the order for the injunction is made, the plaintiff at law, notwithstanding these words, is not at liberty to take any step which will enable him to demand a plea. (*f*)

It has also been determined, that the words "*for default of plea,*" mean for default of an *issuable plea;* and further, that as the plaintiff may, by the express terms, try an issue on the *fact*, by the same reason he may try an issue of *law.* Accordingly where a defendant at law had put in a frivolous plea, to which the defendant in equity demurred, and obtained judgment, it was contended, that this was a breach of the injunction, it being only in one case, viz:—"for default of plea," (*g*) that the defendant might enter up judgment; and here it was said, there was no want of a plea; Lord Macclesfield, however, was clearly of opinion that this was no contempt, since a frivolous plea is as no plea. (*h*)

The construction also given to the words "*to enter up judgment,*" has been, that they apply to a *final judgment;* all that the Court intends to restrain [*367] is execution. The plaintiff may, *therefore, proceed so far as to place himself in a situation in which he may be able to take out execution the instant that the injunction is dissolved; consequently, after an interlocutory judgment, as by default, or on demurrer, the plaintiff at law may go on to ascertain his damages. (*i*) Where the defendant in equity had brought an action against the plaintiff, as executor, and on *plene administravit* pleaded, took judgment *de bonis testatoris cum acciderint*, and afterwards took out *a scire facias*, in order to inquire after assets; it was said, that the *scire facias* was in the nature of a new action after judgment; and that this was a breach of the injunction, being a proceeding after judgment; Lord King, however, held, that it was no breach being only a continuation of the old action on the same record, and

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(*a*) *Ante*, p. 281. (*b*) Bullen v. Ovey, 16 Ves. 143.
(*c*) Harr. ed. Newl. 541; 1 Turn. & V. 362.
(*d*) *Ante*, p. 280. (*e*) 3 P. Wms. 147, n.
(*f*) Sidney v. Hetherington, 3 P. Wm. 147, n.; Bullen v. Ovey, 16 Ves. 141; Mills v. Cobby, 1 Mer. 3; Eden on Inj. 69.
(*g*) Morrice v. Hankey, 3 P. Wms. 146.
(*h*) Sidney v. Hetherington, *ubi supra;* Eden, 70.
(*i*) 3 P. Wm. 147.

in the nature of a proceeding after an interlocutory judgment to a final one. (*k*) And where an injunction having been obtained to restrain the defendant from proceeding on an award for payment of money, which had been made a rule of the Court of King's Bench, the defendant applied to that Court for an attachment for non-performance of the award, and obtained a rule to shew cause; Lord Roslyn was of opinion, that, by analogy to the practice, which, where an action has been actually commenced, permits a party to go on to trial and judgment, and only stays execution; the making the award a rule of Court, which had been done before the injunction, was to be considered as the commencement of the proceeding; and that the defendant might not only obtain a rule to shew cause, but might even have gone on to make his rule absolute, without being guilty of a breach of the injunction, provided he did not execute the attachment. (*l*) It is scarcely necessary to cite a case to shew that it is not a breach to shew cause against a rule for a new trial; (*m*) but where an injunction had been obtained to restrain the defendant from taking possession under a verdict which he had obtained in ejectment and previous to the issuing the injunction the costs of the action had been taxed, *and a writ of possession executed; the plaintiff at law having afterwards procured an attachment for non-payment of the costs taxed, was considered, by Lord Eldon, as guilty of a breach of the injunction. (*n*) But where an injunction had been obtained by an obligor in a joint several bond upon a bill to which the co-obligor was not a party, execution was afterwards taken out upon a joint judgment; but the obligee gave notice to the Sheriff of the injunction, and directed him not to take the plaintiff in equity; upon the question whether this was a breach of the injunction, Lord Eldon observed, that when the motion was first made, he thought it a breach; that the writ of execution given to the Sheriff, without any instructions, was, upon his receipt of it, a command of the law to take the defendant; and whether the Sheriff did or did not take him, it would be a proceeding; if, however, a direction was given to the Sheriff, not to proceed against the person of that defendant, with notice of the injunction restraining any proceedings against him; that defendant was named in the writ *pro formâ* and *ex necessitate;* and it was in substance a proceeding against the other defendant only, and not a breach of the injunction. (*o*)

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It is now clearly settled, that if an injunction is obtained by a defendant at law who has given bail, a proceeding against the bail is a breach of the injunction, although he is no party to the suit. (*r*) Formerly the course was different, and the bail were obliged to file a bill themselves; "but," to use the words of Lord Eldon, "we are now got into a much worse practice." The alteration began with Lord Thurlow, and so it has been continued till the present time, on the ground that a proceeding at law against a bail is to be treated as a proceeding against the party. (*s*) But the principle will not be extended to the surety, or the co-obligor in a bond who is not a party to the suit; for there is no instance where it was ever held, that if one obligor file his bill for an injunction, without making the other *either a co-plaintiff or a defendant: a proceeding at law against that obligor was considered a breach of the injunction, on the mere policy that, if one obligor pays by compulsion, the other will have to indemnify him or *finally* to *contribute* to the debt. (*ss*)

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(*k*) Ibid; Morrice v. Hankey, 146.
(*l*) Franco v. Franco, 2 Cox, 420.
(*m*) Whitemore v. Thornton, 3 Pri. 241.
(*n*) Partington v. Booth, 3 Mer. 148.
(*o*) Chaplin v. Cooper, 1 V. & B. 16.
(*r*) Stone v. Tuffin, Amb. 32; Franklyn v. Thomas, 3 Mer. 234.
(*s*) Leonard v. Attwell, 17 Ves. 385.
(*ss*) Chaplin v. Cooper, 1 V. & B. 16.

The rule, however, is acted upon with regard to proceedings against the Sheriff: and the taking out a rule for the Sheriff to bring in the body, when an injunction has been obtained in equity to restrain the plaintiff from proceeding with his action, (*t*) or the suing out a writ to compel the Sheriff to make a proclamation for the outlawry of the plaintiff, (*u*) or the calling on the Sheriff to pay the money, is a breach of the injunction. *Bolt* v. *Stanway*, (*x*) is a strong illustration of the rule:—in that case the defendant had taken out execution and the Sheriff had levied before the injunction issued; the Sheriff refused to pay over the money levied, and the defendant commenced an action against him for money paid and received to his use. An attachment was issued against the defendant, for this proceeding; upon a motion to set aside which, it was argued that the plaintiff was not a party to the suit; that the bill did not pray an injunction against him; and that, as the Sheriff had levied, he was bound immediately to pay over. The Court, however, said, that though the words of the injunction were only against proceeding in the action at law against the plaintiff, yet the clear meaning of it was to prevent the defendant from having any benefit of that suit as long as the injunction subsisted. If the proper mode of compelling the Sheriff to pay over the money levied, had been pursued,—that is, if a rule had been obtained against him, it would clearly have constituted a breach of the injunction, and therefore the circuitous and improper mode of suing the Sheriff in a fresh action could not give the defendant a better claim. The writ under which he levied, and the return he made to it, are parts of the suit; and any mode of compelling the Sheriff to make such return, [*370] or to complete the execution, *seem, in sense, a proceeding in the action within the meaning of the injunction. It is to be observed that, in *Iveson* v. *Harris*, (*u*) Lord Eldon appears to have doubted the correctness of the decision, on the ground, that the Court is not competent to hold a man bound by an injunction who is not a party to the cause for the purpose of the cause; the old rule being, that it was necessary to bring a person into Court, so as, according to the ancient laws and usages of this country, to be made a subject of the writ; but, as he subsequently held the contrary, in *Leonard* v. *Attwell*, (*x*) the practice may be considered to be finally settled as stated.

An injunction to restrain proceedings at law is directed to the defendant, his *counsellors, attorneys, solicitors, and agents*, (*y*) and a special injunction to restrain waste, &c., is usually directed to the party, *his servants, workmen, and agents*; (*z*) consequently, if the counsellors, attorneys, &c., of the party, in the first case; or his servants, workmen, or agents in the second, having had notice of the injunction, do any thing inhibited by it, they will be guilty of a contempt. (*a*)

With respect to what will be considered as a breach of a special injunction, that must depend entirely upon the form of the injunction and the nature of the act to be prohibited.

It has been already stated, that an injunction operates from the date of the order, and not from the sealing of the writ; (*b*) and it is to be observed, that although an injunction be irregularly obtained, it is still an order of the Court and must be discharged before it can be disobeyed. Where, however, the defendant and his solicitors had been guilty of a breach of an injunction which

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(*t*) Bullen v. Ovey, 16 Ves. 141.
(*u*) Marsack v. Baily, 2 S. & S. 577.
(*x*) 2 Anst. 556.
(*u*) 7 Ves. 251, 256.
(*x*) 17 Ves. 385; *et vide etiam*, Stone v. Tuffin, Amb. 32; Franklyn v. Thomas, 3 Mer. 234.
(*y*) *Ante*, p. 280.
(*z*) *Ante*, p. 354.
(*a*) *Vide* Lewes v. Morgan, 5 Pri. 518.
(*b*) *Ante*, p. 279.

was irregular, Lord Eldon refused to commit them, but ordered them to pay the costs occasioned by the breach of injunction and of the motion to commit. (*c*)

Before the Court will punish for a breach of an injunction, it must be clear that the party knew that the injunction *had been issued; strictly [*371] speaking, he ought to be served with the writ itself, under the seal of the Court, in the manner already pointed out, but circumstances will justify a committal without the actual service of the writ, as where the matter is pressing and there is not time to procure the writ; or where the order is made in vacation, when the offices are closed: in such cases, as we have already seen, (*d*) the service of the writ will be dispensed with, and service of a copy of the minutes of the order, or of a notice of their having been passed, will be sufficient.

In some cases, a committal may be ordered, where neither the writ nor the minutes of the order have been served, nor any personal notice given; thus it was held, by Lord Hardwicke, that if the person was in Court at the time the order for an injunction was pronounced, that alone would be sufficient notice; (*e*) and if the party should remain in Court, until the order was about to be made, he cannot, by getting out of the hall at that instant avoid its consequences. (*f*) So also, if he is informed that the injunction has been granted, and there has been no delay on the part of the plaintiff in endeavouring to get the order drawn up, the defendant will be committed for the breach of it; because it would be a contempt to act contrary to such an order, when he knew the order was made. (*g*) In these and the like cases all the mischief might be done, and the Court might as well grant no injunction at all, unless this kind of notice was to be held sufficient before the great seal was actually applied to the writ. In the instance of an injunction against committing waste, the party in the interval might lay the axe to the trees; or if it was against marrying a ward of Court, the marriage might be had next morning by a license fraudulently obtained.

In short, the Court will not, under such circumstances, permit a man to elude its justice by doing that before the injunction is sealed, which, if it was actually sealed, would be a contempt. *But the plaintiff must not be [*372] guilty of any unnecessary delay either in getting the order drawn up, or in serving it when obtained; for though the Court will prevent his losing the benefit of the process, while he is actually pursuing it, yet it cannot consider him as entitled to that order for three or four months together. (*h*)

Where a party has been guilty of a contempt by the breach of an injunction, the proper course of proceeding, if he be not a Peer or otherwise entitled to privilege of Parliament, is to obtain an order for his committal. (*i*)

This order must be obtained upon motion, of which notice must have been duly served upon him *personally*. And it is to be observed that the terms of the notice of motion should be that the party "*may stand committed*" to the Fleet Prison, for breach of the injunction, and not "*that he may shew cause*

(*c*) Partington v. Booth, 3 Mer. 148. (*d*) *Ante*, pp. 279, 354.
(*e*) Anon. 3 Atk, 567; Skip v. Harwood, ib. 564.
(*f*) Osborne v. Tennant, 14 Ves. 136.
(*g*) Kimpton v. Eve, 2 V. & B. 349; Vansandau v. Rose, 2 J. & W. 264.
(*h*) James v. Downes, 18 Ves. 522.
(*i*) Angerstein v. Hunt, 6 Ves. 488. The practice formerly was, that, upon affidavit of service of the injunction, an attachment would issue for the breach of it. If the defendant was arrested upon the attachment, and entered his appearance with the Registrar, interrogatories were filed and exhibited against him, to which he must answer upon oath. If he denied the service, the other party might examine witnesses to prove it, and, if proved, the Court made him pay all costs and charges before he could be discharged. Harr. ed. Newl. 551.

why he should not be committed." (*k*) The plaintiff, however, may, as it seems, obtain an order *ex parte* that the defendant may stand committed on a certain day unless he shews cause against it, which order must be *personally* served upon the party to be committed. But, whether it be the order *nisi*, or a notice of a motion for an absolute committal, the service must be personal, unless where the defendant has absconded: in which case, an order may be obtained that service on his Clerk in Court or at his last place of abode shall be deemed good service; and, upon that service, under such circumstances, he may and will be committed. (*l*)

An affidavit of the personal service of the notice of motion, or of the order *nisi*, should of course be prepared and filed, and, *on the day named in the notice, the motion should be made by the counsel for the plaintiff, for the commitment; but, if an order *nisi* has been obtained and served, the application should be that it may be made absolute.

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In *Ellerton* v. *Thirsk*, (*m*) Lord Eldon is reported to have said that a motion to commit for breach of an injunction could not be made without producing the writ; but, in a recent case, (*n*) Lord Cottenham held, that if a party having notice of an injunction is guilty of a breach of it, he may be committed without the production of the writ. His Lordship, upon that occasion, observed, "he did not think that Lord Eldon could ever have laid down such a rule as that in *Ellerton* v. *Thirsk*,—the writ bears date when the order is passed. If, therefore, the proposition were correct, a party would have all the interval between the making and the passing of the order, to commit the act which the injunction is intended to restrain."

It is to be observed, however, that the decision of Lord Cottenham applies only to cases in which it may be necessary to apply to the Court to punish for a breach of the injunction committed before the injunction has been issued, and not to cases in which the application is made after the injunction has been issued and served. (*nn*)

If, when the motion is brought on, the other side is not prepared to resist it, the Court usually gives him a day to shew cause against it; and then, upon hearing the affidavits, the Court decides whether the party is guilty of the breach of the injunction or not, and, if he be guilty, makes an order for his commitment to the Fleet Prison.

The effect of a committal for a breach of injunction is usually that of retaining the offender in prison until he submits by paying the adverse party his costs. (*o*)

It is to be observed, however, that, if the breach of injunction was the result rather of an error in judgment than of a *wilful contempt, the Court will not direct a commitment, but will merely order the party to pay costs incurred by the breach of the injunction and by the application. (*p*)

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The plaintiff may, also, by his acquiescence in the breach, dispense with the ordinary process; though, strictly speaking, no act of the parties can amount to a waiver of a contempt of the Court. (*q*)

(*k*) Ibid. 552. When the injunction is that he may do a particular thing, the order is, that he may do it by a particular day, or stand committed; Durant v. Moore, 2 R. & M. 38.

(*l*) Sir W. Pulteney v. Shelton, 5 Ves. 147; Pearce v. Crutchfield, 14 Ves. 206.

(*m*) 1 J. & W. 376.

(*n*) M'Neil v. Garratt, 1 Craig. & Phillips, 108.

(*nn*) In a recent case, where the writ had been actually issued and served, the question whether it was necessary that it should be in Court upon a motion for a committal, was discussed before Lord Langdale, M. R., who, however, did not decide the point.

(*o*) Harr. ed. Newl. 552.

(*p*) Partington v. Booth, 3 Mer. 148; *vide etiam* the Marquis of Downshire v. Lady Sandys, 6 Ves. 107.

(*q*) Mills v. Cobby, 1 Mer. 3.

Peers and others entitled to privilege of peerage, and Members of the House of Commons, are not liable to be committed for a breach of an injunction, but the Court will order a sequestration to issue. (*r*)

The same course of proceeding may be adopted in the case of a corporation aggregate.

It has already been observed, that, although an injunction be irregular, a party, acting in contravention of it, will be guilty of a contempt. (*a*) The proper course, where there is an irregularity in the injunction, is to apply to discharge it. (*b*)

For this purpose the party affected by it may, by motion of course, obtain an order to refer it to a Master; and then, if the Master reports it to have been irregularly issued, and no exceptions are filed, the Court, upon the Master's report, will dissolve the injunction. (*c*)

But although the above method of obtaining the opinion of the Court upon the regularity of an injunction may be resorted to where convenient, the more usual course is, to move at once, upon notice, that the injunction may be discharged for irregularity.

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*CHAPTER XXXIII. [*375]

OF THE WRIT OF NE EXEAT REGNO.

SECT. I.—*In what Cases issued.*

A *Ne exeat Regno* is a writ which issues to restrain a person from going out of the kingdom, without the king's license or the leave of this Court. It is a high prerogative writ, which was originally applicable to purposes of state only, but was afterwards extended to private transactions. (*a*)

"It is mostly used where a suit is commenced in this Court against a man, and he, designing to defeat the other of his just demand, or to avoid the justice and equity of this Court, is about to go beyond sea, so that the duty will be endangered if he goes." (*b*)

A *ne exeat regno* issues, only, where the claim upon the party going abroad is equitable, and it will be refused upon a mere demand at law for money, "for there," it is said, "the defendant may be arrested, and obliged to give bail, who will be liable, unless they surrender him, and he may be as easily taken by that process as on a *ne exeat regno*." (*c*)

(*r*) *Vide* Robinson v. Ld. Byron, 2 Dick. 703; Marq. of Downshire v. Lady Sandys, *ubi supra*.

(*a*) *Ante*, p. 370; *et vide* Marq. of Downshire v. Sandys, 3 Mer. 107.

(*b*) Robinson v. Lord Byron, *ubi supra*; Partington v. Booth, 3 Mer. 149.

(*c*) Harr. 552.

(*a*) Jackson v. Petrie, 10 Ves. 164.

(*b*) Prac. Reg. 289.

(*c*) *Per* Lord Hardwicke, in Pearne v. Lisle, Amb. 75; *vide etiam*, Brocker v. Hamilton, 1 Dick. 154; Grimes v. Stritho, 2 Dick. 469; *ex parte* Duncombe, 2 Dick. 503; Crosley v. Marriot, ib. 609; *ex parte* Brunker, 3 P. Wms. 314; Anon. 2 Atk. 210; 1 Dick. 82, S. C. sub. nom. King v. Smith; Anon. 1 Bro. C. C. 376; Atkinson v. Leonard, 3 Bro. C. C. 218.

It is not, however, the mere circumstance, that the defendant may be arrested and held to bail at law, which induces the Court to refuse a *ne exeat regno* for a legal demand, it will not even grant it in cases where the defendant is not [*376] liable to *arrest, as in the case of an attorney who is privileged from arrest. (*d*)

The only exception to the rule, which requires the demand to be equitable, is in the instance of *alimony* decreed by the Spiritual Court, in which case, as the Spiritual Court cannot take bail, this Court will lend its assistance to the woman. (*e*)

It is, however, only where there has been an actual decree for alimony, that this Court will issue the writ, and it has refused to do so upon the mere allegation that the plaintiff was suing her husband in the Ecclesiastical Court; if she had not obtained a decree; (*f*) and it seems that, even where there has been a decree for alimony, the writ will not issue pending an appeal from it by the husband. (*g*) Nor will it be issued for *interim* alimony, granted *pendente lite*, before a decree; (*h*) nor for any other sum than that which is actually due for the alimony and costs. (*i*)

With reference to what will be considered as such an equitable demand as may be the foundation for a *ne exeat regno*, it is to be noticed, that, wherever a party has a claim against another, which he can only enforce in a Court of Equity, the Court will issue the writ; therefore, where a man had executed a bond to the trustees of his marriage settlement, a party, beneficially interested in the money secured by it, was allowed to have a *ne exeat regno* against the obligor. (*k*) The same principle was afterwards acted upon by Lord Eldon, in *Grant* v. *Grant*. (*l*) It is, however, to be observed, that, in a case where a bill was filed by a residuary legatee against the executor and a debtor to the [*377] estate stating, that, by collusion between them, the defendant *was suffered to remain unpaid, and that the debtor was about to leave the country, Lord Eldon refused the application for a *ne exeat regno*, saying, he did not know any instance where it had been done. (*m*) It is to be recollected, that the foundation of the equity in this case was the collusion, alleged in the bill, between the executor and the debtor; his Lordship's decision, therefore, was probably governed by the principle laid down by him in a case, mentioned by Mr. Beames in his Treatise upon the Writ of *Ne exeat Regno*, (*n*) in which the plaintiff filed his bill on the ground of fraud, stating a large balance to be due to him from the defendant; and the writ was refused by Lord Eldon, who said—"Here I am called upon to grant the writ in a case of alleged fraud, and that, by the fraudulent conduct of the defendant, such a sum will be due; this is going further than the Court ever has gone." The same principle had also been acted upon by his Lordship, in *Jackson* v. *Petrie*, (*o*) in which the bill was filed to set aside a sale of a West India estate, suggesting that the sale was fraudulent, and that the defendant was therefore liable to account for the rents and profits, and was, on that account, indebted to the plaintiff; but his

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(*d*) Gardner v. ———, 15 Ves. 444.

(*e*) Pearne v. Lisle, Amb. 75; Smithson's Case, 2 Vent. 345; Read v. Read, 1 Ch. Ca. 115; Anon. 2 Atk. 210; *ex parte* Whitmore, 1 Dick. 143; Head v. Head, 3 Atk. 295; Shaftoe v. Shaftoe, 7 Ves. 171; Dawson v. Dawson, ib. 173; Haffey v. Haffey, 14 Ves. 261.

(*f*) Shaftoe v. Shaftoe, 7 Ves. 171; Coglar v. Coglar, 1 Ves. J. 95.

(*g*) Street v. Street, 1 T. & R. 322. (*h*) Ibid.

(*i*) Shaftoe v. Shaftoe, *ubi supra*; Dawson v. Dawson, *ubi supra*; Haffey v. Haffey, *ubi supra*.

(*k*) Leake v. Leake, 1 J. & W. 605. (*l*) 3 Russ. 599.

(*m*) Graves v. Griffith, 1 J. & W. 646. (*n*) Beames on *ne exeat*, p. 56.

(*o*) 10 Ves. 165.

Lordship refused the writ, observing, that the foundation of the equity, in the case, was the alleged fraud "not particularly stated but only upon information and belief; considering, therefore, that, at some period, the contract will be set aside in this Court, and the purchaser will therefore become a debtor for the rents and profits, it is beyond all sight to grant this writ in such case."

The Court has also refused to grant the writ to assist process of contempt, by which payment of costs is enforced, (*p*) although it has been granted for that purpose in Ireland. (*q*) It seems, however, that where, upon the taxation of a solicitor's bill, he appears to have been over-paid, the Court will grant a *ne exeat* to prevent his going abroad, and that without requiring a bill to be previously filed. (*r*)

*It is to be observed, in this place, that although the Court will not grant a *ne exeat regno* where the demand is at law, it will not refuse it merely because the plaintiff might have relief at law, if the case be one in which the Court of Chancery has a concurrent jurisdiction, as in the case of a suit for an account. (*s*) [*378]

So also the Court will grant the writ upon a bill to recover the amount due upon a bond which has been lost, although, by the present practice of the Courts of Law, a plaintiff may now declare upon a lost bond, which he could not do formerly; for the Court of Chancery does not consider that the circumstances of a Court of Common Law having by an extension of its rules acquired a concurrent jurisdiction, is sufficient to defeat its jurisdiction in equity. (*t*)

The same principle will also extend to cases of specific performance, for although in such cases the vendor may have a right to proceed at law for the recovery of his purchase money, yet, as equity has a concurrent jurisdiction in such matters, a *ne exeat* will be issued to restrain the vendor from going abroad till he has given security for the amount of his purchase money. (*u*) It is to be observed, however, that there appears to have been some doubt whether, in cases of this description, the Court will grant the writ, before there has been some decree establishing the plaintiff's right to a specific performance. In *Raynes* v. *Wyse*, (*x*) Lord Eldon asked whether any case had been found in which a *ne exeat* had been maintained upon an agreement, before it had been shewn that the plaintiff was entitled to a specific performance. A similar doubt appears to have occurred to Lord Thurlow, in the anonymous case referred to by Mr. Dickens in his note to *Goodwin* v. *Clarke*; (*y*) and in *Boehm* v. *Wood*, (*z*) (in which, however, there had been a decree,) *Lord Eldon said, "Whether the writ ought to be granted merely on the footing of contract, I shall not say a single word, this is not a mere case of contract; so that it still remains to be determined whether, in the case of a bill for the specific performance of a contract, a writ of this nature will issue upon the mere allegation of the existence of a contract, before a decree has been pronounced upon its validity." In a subsequent case, his Lordship discharged a writ which had been obtained against a vendee in a suit for a specific perform- [*379]

(*p*) Goodman v. Sayers, 5 Mad. 471. (*q*) Stewart v. Stewart, 1 B. & B. 73.
(*r*) Loyd v. Cardy, Prec. in Ch. 171; *sed vide ex parte* Brunker, 3 P. Wm. 312.
(*s*) Jones v. Alephsin, 16 Ves. 470; *et vide* Jones v. Sampson, 8 Ves. 593; Russel v. Asby, 5 Ves. 96; Amsinck v. Barklay, 8 Ves. 597; Hannay v. M'Entire, 11 Ves. 55; Howden v. Rogers, 1 V. & B. 129; Dick v. Swinton, ib. 371.
(*t*) Atkinson v. Leonard, 3 Bro. C. C. 218.
(*u*) Boehm v. Wood, T. & R. 332, 334; *vide etiam* Raynes v. Wyse, 2 Mer. 472, and Goodwin v. Clarke, 2 Dick. 497, (which, however, appears not to have been rightly decided,) *vide* T. & R. 345.
(*x*) *Ubi supra.* (*y*) 2 Dick. 497.
(*z*) T. & R. 345.

ance, because "the facts of the case and the transactions between the parties did not go that length which authorized him to say, he could not have a rational doubt, whether there should or should not be a specific performance of the contract; and *unless the Court can make it out, to be quite clear that there must be a specific performance, it cannot grant the writ* of *ne exeat regno*. (*a*)

It is to be remarked that, in the anonymous case, above referred to as having been decided by Lord Thurlow, (*b*) his Lordship is reported to have said, that, "although he go abroad, *non constat* he hath not property here;" upon this passage, however, Lord Eldon, in *Boehm* v. *Wood*, (*c*) remarks, "I think Dickens must have misunderstood Lord Thurlow in that case, because the writ is granted with analogy to bail at law; and at law, you never ask whether a man has property or not, but you make him give bail, leaving it to the bail to inquire whether he has property to indemnify them." Nor does it make any difference that, in such a case, the vendor has in equity a lien upon the property sold for the amount of his purchase money, which he may enforce by selling the property; (*d*) and it seems that even where the defendant has a claim for an abatement out of the purchase money, which however has not been ascertained, the writ will be granted for the whole. (*e*)

In a recent case, before Lord Brougham, an attempt was made to extend the principle, that in the case of a suit for the specific performance of an agree-
[*380] ment, the Court will grant the *writ,—to a suit for the specific performance of a covenant to indemnify. (*f*) In that case, *Jenkins* having demised a portion of certain lands to *Cockburn*, and covenanted with him that he would not erect or suffer to be erected any buildings whatever upon the other portion of the lands demised, entered into an agreement with *Parkinson* to let to him the portion of the land which was not included in the demise to *Cockburn*, subject to a covenant whereby *Parkinson* agreed to indemnify *Jenkins* against any breach of the covenant with *Cockburn*. The covenant was broken, and *Cockburn* recovered damages against *Jenkins*, who brought his action over against *Parkinson*, upon his covenant to indemnify, and recovered a verdict for the damages and costs. *Jenkins*, however, died before the judgment against *Parkinson* was perfected, whereby the damages were lost; in consequence of which *Jenkins's* executors filed a bill against *Parkinson* for a specific performance of his covenant to indemnify *Jenkins*, and, on application to the Lord Chancellor in vacation, a *ne exeat regno* was granted against *Parkinson*, marked for the amount of the damages and costs; but, upon an application being afterwards made, by motion, to discharge the writ, his Lordship discharged it.

The case was principally argued upon the question, whether a party entitled, by agreement, to satisfaction by way of damages for the non-performance of the agreement, can come into equity to enforce that satisfaction; and Lord Brougham was of opinion, after due consideration of the cases cited, that the right to such relief was extremely doubtful, and therefore held that, although where the equity is clear, though the facts are in dispute, the writ may be sustained, yet that where, (as in that case,) the equity is matter of grave doubt, the plaintiff, however specific his allegation may be, cannot, generally speaking, have the writ. The principal ground, however, for discharging the writ was, that although the verdict against *Jenkins* himself was gone by his death, the executors might themselves bring another action against the defendant. His Lordship observed "Whether they can hold the defendant to bail or not is

(*a*) Morris v. M'Neil, 2 Russ. 604.
(*b*) 2 Dick. 497.
(*c*) T. & R. 338.
(*d*) Ibid. 346.
(*e*) Ibid.
(*f*) Jenkins v. Parkinson, 2 M. & K. 5.

immaterial, though it is not said *why they cannot. If he has been already arrested, that, of itself, is a conclusive answer to the application for a *ne exeat;* if not, no reason is given why he may not be arrested now, in a new suit. [*381]

But although the Court of Chancery will grant this writ in cases where the Court has concurrent jurisdiction with the Courts of Law, it will not permit the defendant to be harrassed by a *ne exeat regno*, where he has already been held to bail in a Court of Law for the same demand; and if, under such circumstances, the writ has been issued, it will be discharged. Therefore where the defendant had entered into a contract with the plaintiff for the purchase of an estate, and the plaintiff had arrested him at law and held him to bail for the amount of the purchase money, which bail was afterwards discharged in consequence of the plaintiff having discontinued the suit, a writ of *ne exeat regno*, subsequently obtained by the same plaintiff upon a bill to enforce the same contract, was discharged. (*g*)

So, also, where a defendant had been held to bail at law, in an action commenced against him by the plaintiff, for the balance of an account, and it was afterwards found more convenient to proceed in equity by bill, whereupon the defendant was discharged from his arrest at law, and a *ne exeat* was issued against him by this Court, Lord Eldon discharged the writ. (*h*)

It may be mentioned, however, that although the Court will not grant or sustain the writ of *ne exeat regno*, where the party has already been arrested or held to bail at law, it will not, after the writ has been discharged in equity, interfere to direct the party to be discharged from a subsequent arrest at law for the same demand, but will leave it to the Court of Law to determine whether, under the circumstances, the common law process ought to be made available. (*i*)

In order to authorize the issue of a *ne exeat regno*, the demand must not only be equitable, but it must be a pecuniary demand, therefore the Court has refused to grant the writ *upon a bill to enforce an agreement by which the defendant had undertaken to give the plaintiff a bill of exchange as a security for a demand. (*k*) [*382]

And the demand must not only be pecuniary, but it must be actually due. (*l*) The writ will not be issued in respect of a contingent claim; therefore, where it was nothing more than the demand of a wife against her husband, by virtue of a marriage agreement, in which the defendant obliged himself to secure £1700 out of his estate, for his wife, as a provision, in case she survived him, Lord Hardwicke refused the application, as the contingency was one which might never happen. (*m*) But even where the debt's becoming due does not depend upon a contingency, but is *certain, though future*, the writ cannot be granted; and in *Whitehouse* v. *Partridge*, (*n*) Lord Eldon says, "I recollect a scandalous instance of advantage taken of that rule: a creditor having given time to his debtor, from the 1st of January to the 1st of July, in the last week in June, the debtor thought proper to attempt to leave the kingdom, and, on great consideration, this Court decided that it could not grant the writ." In that case, his Lordship refused a *ne exeat* to restrain the defendant from going abroad for the purpose of evading the payment of a sum of money which he had been ordered to pay into a banking house, as the condition of the Court's granting an injunction, because the time when the party was bound by the order

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(*g*) Raynes v. Wyse, 2 Mer. 472.
(*h*) Amsinck v. Barklay, 8 Ves. 594.
(*i*) Walker v. Christian, 7 Sim. 367.
(*k*) Blaydes v. Calvert, 2 J. & W. 211.
(*l*) Whitehouse v. Partridge, 3 Swanst. 365, 377.
(*m*) Anon. 1 Atk. 521.
(*n*) 3 Swanst. 377; and *vide* Cock v. Ravie, 6 Ves. 284; Dawson v. Dawson, 7 Ves. 174; Haffey v. Haffey, 14 Ves. 261.

to pay the money, *i. e.* a month from the date of the order, was not arrived. His Lordship, however, stated that if between the date of an order for an injunction and the payment of the money into Court at a future time, there is a substantial threat, that the party, who ought to pay, will go abroad, the practice of the Court is to order him to pay the money *instanter* or to dissolve the injunction. (*o*) The fact is, that, to entitle the plaintiff to the writ, he must [*383] be in a situation *either to swear positively that so much is actually due, (*p*) or in some other manner to point out to the Court the sum to be marked on the writ; (*q*) upon which principle it is, that, in cases of alimony, the writ has, as we have seen, been strictly confined to the arrears of alimony actually due and costs. (*r*) The only exception to the rule, which requires that the plaintiff should be in a situation to swear positively that a certain sum of money is due, is in the case of a suit for an account, in which it will be sufficient, if the plaintiff can swear, that, *according to the best of his belief*, any particular sum, *at the least*, would be found justly due to him upon a balance, if the account were taken. (*s*)

This writ was originally applied to persons domiciled in this country, "but for a long course of years it has been settled, that, if a man lives in Scotland (*t*) or Ireland, (*u*) or in our colonies, (*x*) or in other parts of our dominions, (and in parts too where there can be no arrest for debt,) yet if, being a debtor, he comes here, and the party who is his creditor can pledge his oath that he is such a debtor, if it is a legal debt, he may be held to bail, and if it is an equitable debt, this writ of *ne exeat regno* may issue against him, although he comes here for a particular purpose only, and intends to return immediately."(*u*)

Upon this principle the Court acted, in *Atkinson* v. *Leonard*, (*y*) where it granted the writ at the instance of an inhabitant of one West India colony against an inhabitant of another, who was only here for a casual purpose. It [*384] is to be remarked that, in the above case, the debt was contracted *in the colony, and might have been recovered in the Courts there, according to the law of this country which was there in force; but that, in *Robertson* v. *Wilkie*, (*z*) Lord Hardwicke appears to have held that, where such was the case, he would not grant the writ, although he would where the subject matter arose in Gibralter and Minorca, where the laws were not the same as here. It is, however, now settled, in conformity with *Atkinson* v. *Leonard* and *Jackson* v. *Petrie*, (*a*) that a writ of *ne exeat* may issue against any defendant whose residence is out of England, in respect of a debt contracted abroad and recoverable there. (*b*)

(*o*) 3 Swanst. 375.

(*p*) Rico v. Gualtier, 3 Atk. 501; Anon. 1 Bro. C. C. 376; Shermam v. Shermam, 3 Bro. C. C. 370; *vide etiam* Butler v. Butler, cited in Beames on Ne Ex. p. 52.

(*q*) Boehm v. Wood, T. & R. 332. (*r*) *Ante*, p. 376.

(*s*) Rico v. Gualtier, *ubi supra;* Butler v. Butler, *ubi supra;* Jackson v. Petrie, 10 Ves. 165; *vide post*, p. 389.

(*t*) Mackintosh v. Ogilvie, 1 Dick. 119; Done's Case, 1 P. Wm. 263. As to the form of the recognizance in such case, *vide post*.

(*u*) Howden v. Rogers, 1 V. & B. 129; *sed vide* Bernal v. the Marquis of Donegal, 11 Ves. 43, where it was refused on the ground of parliamentary privilege, the defendant being a representative in Parliament of an Irish borough.

(*x*) *Per* Lord Eldon, in Flack v. Holm, 1 J. & W. 418.

(*y*) 3 Bro. C. C. 218.

(*z*) Amb. 177; 2 Dick. 786, S. C.; *vide etiam* Pearne v. Lisle, Amb. 76, S. P.

(*a*) *Ubi supra.* (*b*) Howden v. Rogers, 1 V. & B. 129.

It seems also, that the writ will be granted where the plaintiff is an Englishman and the defendant a foreigner; (*c*) but whether it can be granted where the plaintiff and defendant are both foreigners and the debt was contracted in their own country, appears to be doubtful; (*d*) although if the question is between two foreigners, but the subject matter has arisen in this country, the writ will be granted. (*dd*)

It may be observed here, that, in *Atkinson* v. *Leonard*, (*e*) it is stated, that the plaintiff was usually resident in the island of Antigua, and that the defendant resided in Tortola and had come to this country casually, and that no objection was taken to the writ because of the plaintiff's residence out of the jurisdiction of the Court; in *Hyde* v. *Whitfield*, (*f*) however, Lord Eldon appears to have considered the circumstance of the plaintiff's being a resident in Scotland, a decided ground of objection to the writ; and, in *Smith v. Nethersole*, (*g*) Lord Brougham discharged a writ of *ne exeat regno*, which had been issued at the instance of a plaintiff who was resident in Jamaica, against a defendant who was resident in the same colony, on the ground that the plaintiff resided abroad, and that his visit to this country was colourable and temporary only. *And the same rule has been acted upon by Sir L. Shadwell in subsequent cases. (*h*) [*385]

A doubt appears to have been raised, in *Stewart* v. *Graham*, (*i*) whether a *ne exeat regno* can be granted against a man going abroad in the course of his ordinary business, but Lord Eldon granted the writ, upon the authority of *Dick* v. *Swinton*, (*k*) where the writ had been issued to restrain the captain of an East India ship from proceeding on his voyage.

The question whether a *ne exeat regno* can be granted against a *feme covert*, has been the subject of investigation in a former part of this treatise: (*l*) whether it can be granted at the suit of a *feme covert* against her husband has been much discussed; but there can be no doubt that, in the case of alimony, a *feme covert* may obtain a writ of *ne exeat regno* against her husband,—whether she can obtain it in any other case does not seem equally clear.

In *Sedgwick* v. *Watkins*, (*m*) Lord Thurlow refused to grant the writ at the instance of a *feme covert* administratrix against her husband, on her affidavit, that he had possessed the assets and was going abroad. His Lordship said, that the evidence of the wife could not be received against the husband in a case of this nature, and that the only instance of the kind found in the books, was a case in which Serjeant Puckering granted a writ on such an affidavit; but that, on Lord Ellesmere's coming to the Great Seal shortly afterwards, a similar application was made to him, on the authority of that case, which he refused. (*n*) It appears, from Lord Thurlow's judgment in the case, as reported in Vesey, that his Lordship was of opinion that the only instance in which a wife's affidavit can be used against her husband, is where she applies for security of the peace; but this observation must be incorrect, (*o*) as in *the case of alimony the writ will be granted on the affidavit of the wife. (*p*) [*386]

(*c*) Flack v. Holm, 1 J. & W. 415.
(*d*) Ibid. and *vide* Talleyrand v. Boulanger, cited ib. 417, and 4 Ves. 587.
(*dd*) De Carriere v. De Calonne, 4 Ves. 577. (*e*) *Ubi supra.*
(*f*) 19 Ves. 342. (*g*) 2 R. & M. 450.
(*h*) Douglas v. Terry, 2 R. & M. 450, n., and Walker v. Christian, ib.
(*i*) 19 Ves. 313.
(*k*) 1 V. & B. 371, *vide etiam* Tomlinson v. Harrison, 8 Ves. 32; Etches v. Lance, 7 Ves. 417; Loyd v. Cardy, Prec. in Ch. 171; Baker v. Dumaresque, 2 Atk. 69.
(*l*) *Ante*, vol. 1, p. 206. (*m*) 3 Bro. C. C. 11; 1 Ves. J. 49, S. C.
(*n*) *Vide* M'Belt's note to Sedgwick v. Watkins, 3 Bro. C. C. 11.
(*o*) *Vide* De Manneville v. De Manneville, 10 Ves. 56.
(*p*) *Vide* Shaftoe v. Shaftoe, 7 Ves. 171.

It is presumed also, that where a married woman has property settled to her separate use, the Court will, in like manner, allow the wife to make an affidavit in support of an application to restrain the husband from defeating his wife's right, by removing out of the jurisdiction of the Court. (*q*) These cases, however, are peculiar, and are those in which Courts of Equity recognize the right of a wife to maintain a suit against the husband; but the case of *Sedgwick* v. *Watkins* was one in which the Court does not recognize the right of a married woman to sue her husband: and, consequently, the determination of Lord Thurlow to reject her affidavit, although the grounds of it are stated by the reporter in too general terms, was strictly correct.

In *Stewart* v. *Graham* (*r*) a writ of *ne exeat regno* was applied for, on behalf of a lunatic, by his committee, and it was objected that it could not be issued, because the affidavit was made by the committee; but Lord Eldon held that the objection was not available, because, at law, they hold to bail on oath of the assignee where the bankrupt will not make affidavit; his Lordship also added, that he had been informed, that they have held to bail on the oath of a committee.

The Court will also grant the writ at the instance of a party who has made himself liable to the debt of another, even though he has not been called upon to pay the demand. (*s*)

It is not necessary, to entitle a plaintiff to a writ of *ne exeat regno*, that it should be prayed by the bill, although, where the application is intended to be made immediately on the filing of the bill, it is usual to pray it. (*t*) It frequently, however, happens that the defendant's intention to go abroad arises, or is first discovered, in the course of the cause, and then there is no *doubt that the writ would be issued, though not asked for by the bill. In *Collinson* v. ——, (*u*) Lord Eldon says, "when this prerogative writ came to be applied as a civil process, it would have been an extraordinary exercise of jurisdiction to refuse it merely as not prayed in a stage of the proceedings where there was no pretence for praying it. If when the bill was filed, the defendant did not intend to leave the kingdom, it would have been highly improper to pray the writ; a groundless suggestion that the defendant means to abscond would press too harshly and would operate to create the very mischief which the Court, by permitting the motion without notice, means to prevent. The omission to pray the writ, therefore, forms no objection.

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In general the writ can only be granted upon a bill filed, but where, upon the taxation of a solicitor's bill, he was reported to have been overpaid, the client obtained a *ne exeat regno* to prevent his going abroad, *though there was no bill in Court whereon to ground the writ.* (*x*) In *ex parte Brunker*, (*y*) however, Lord Talbot discharged a writ, which had been granted by the Master of the Rolls, without bill filed, observing that, in his experience, he never knew this writ granted or taken out without a bill in equity first filed. But it is to be observed, that in the last case, the plaintiff's demand was one which could only be enforced by bill, whereas, in the first case, the demand was capable of being enforced, by means of the authority which the Court exercises over solicitors, as officers of its own.

(*q*) In Bagot v. Bagot, where real estate was settled to the separate use of a married woman, the Vice Chancellor granted a receiver against the husband, before answer upon notice, the facts of the case being verified by the affidavit of the wife alone. MS. Dec. 1838.

(*r*) 19 Ves. 313.

(*s*) Sealy v. Laird, 3 Swanst. 368.

(*t*) Moore v. Hudson, Mad. & Geld. 219.

(*u*) 18 Ves. 353.

(*x*) Loyd v. Cardy, Prec. in Ch. 171; *ante*, p. 377.

(*y*) 3 P. Wms. 312.

In *Whitehouse* v. *Partridge*, (*z*) which has been already referred to, (*a*) an application for a *ne exeat* was made on behalf of a defendant, to restrain a plaintiff from going abroad, who, upon obtaining an injunction, had been ordered to pay a certain sum of money, and although the *ne exeat* was refused, for the reason before stated, it was stated by counsel at the bar, and not denied, that a defendant may obtain a writ of *ne exeat regno* without filing a bill.

*SECTION II. [*388]

In what manner granted.

The application for a writ of *ne exeat regno* may be made by motion which may be *ex parte*, the reason of which is that the giving notice might operate to occasion the mischief which the writ is intended to prevent, by giving the party an opportunity of removing from the jurisdiction. (*a*) For the same reason, notice of the motion is not required even after the defendant has appeared. (*b*)

The Master of the Rolls, "according to all which is to be found in the books, has as much jurisdiction, to direct the writ to issue, as the Lord Chancellor himself has, though it is by the Lord Chancellor that the seal must be put to the writ, and till that has been done, according to the order of the Court, there is nothing which can be denominated a writ." (*c*)

The same observation will apply to the Vice Chancellors, who, by the statutes under which they are appointed, are authorized to hear and determine all matters which the Lord Chancellor has power to hear and determine. (*d*)

The application for this writ may also be made, by petition, to the Lord Chancellor or Master of the Rolls; (*e*) but, in whichever way the application may be made, it must be supported by an affidavit of the debt, and of the intention of the party to go abroad. (*f*)

It does not appear to be necessary that the affidavit should be made by the plaintiff himself although it is usually made by *him, unless where [*389] he is under some legal disability, as in the case of lunacy, when, as has been already stated, it may be made by his committee; (*g*) *a feme covert* may also, as we have seen in certain cases, make an affidavit in support of a motion for a *ne exeat*, to restrain her husband from going abroad. (*h*)

In *Roddam* v. *Hetherington*, (*i*) the affidavit appears to have been made by an infant, who was plaintiff, by his next friend; and the writ was issued, but afterwards discharged, with costs to be paid by the next friend, because the infant had sworn positively to facts which, from his age, he could only have known from information.

(*z*) 3 Swanst. 365. (*a*) *Ante*, p. 382.
(*a*) *Vide* Collinson v. ———, 18 Ves. 353.
(*b*) Elliot v. Sinclair, Jac. 545.
(*c*) *Per* Lord Eldon in Boehm v. Wood, T. & R. 342.
(*d*) 53 Geo. 3, c. 24; and 5 Vict. c. 5. (*e*) 1 Turn. & V. 987.
(*f*) In Roddam v. Hetherington, 5 Ves. 91—95, Lord Loughborough, C., said, he did not recollect any instance where a *ne exeat regno* had been applied for upon admissions in the answer, but the admission would certainly do as well as an affidavit. An affidavit will also be dispensed with, where the demand has been established by a Master's report duly confirmed. Collinson v. ———, 18 Ves. 353; Moore v. Hudson, 6 Mad. 318.
(*g*) *Ante*, p. 286. (*h*) *Ante*, p. 285.
(*i*) 5 Ves. 91.

No rule is more strong than that the writ shall not issue without a *positive* affidavit, and that an affidavit, as to information and belief only, will not be sufficient. (*k*) The affidavit must be as positive as to the equitable debt, as an affidavit of a legal debt to hold to bail, (*l*) and even where the affidavit is positive, yet if it appear that, under the circumstances, the deponent could only have acquired his knowledge from the information of others, it will be insufficient. Thus, in *Roddam* v. *Hetherington*, above referred to, where a *ne exeat regno* had been obtained on the affidavit of the plaintiff, who was an infant, it was discharged, although the affidavit was positive; because it appeared, from the statement in the bill, that the plaintiff was eighteen years of age, that he could only have known some of the facts deposed to from the information of others.

The only exception to the rule, that the affidavit must be positive, is, as we have seen in the case of an account, in which the plaintiff may swear, that, to the best of his belief, such a sum will be due to him on the balance. (*m*)

It is also required, that the affidavit, on which the application for this writ is founded, should shew that the defendant intends going abroad. It seems, formerly, to have been thought, that the affidavit was, in this respect, sufficient, [*390] if it merely *stated a belief of the defendant's intention to quit the kingdom, without going into the circumstances upon which that belief was founded. (*n*) But that rule has been very properly qualified by later decisions; and it is now held that the affidavit, to obtain this writ, must be positive as to the defendant's intention to go abroad, or to his threats or declarations to that effect, or to facts evincing it. (*o*) "The party," says Lord C. Eldon, "must swear that the defendant is going abroad, to his declaration to that effect, or to circumstances amounting to it: as, where he had accepted a situation, the duties of which he could not execute without going abroad." (*p*) In *Oldham* v. *Oldham*, (*q*) the Court observed, "it is not sufficient to shew that another person said so;" but this must be understood with some qualifications; for, in a subsequent case, where the affidavit was made, "not by the plaintiff, but another, to his belief of the defendant's intention to quit the kingdom, upon information, received from *two persons of his family*, that they were about to go to the Isle of Man," the writ was granted by Lord Eldon; who, after stating that the point had frequently embarrassed him, expresses himself thus:—"But there are cases in which the Court appears to have regarded, and acted upon, the nature of the information and belief. The information is, in this instance, given by *persons of the defendant's family;* who, therefore, could not be brought forward to make an affidavit; and the circumstance, that the party has not made the affidavit, has not been considered an objection." (*r*) But it would seem, from Lord Eldon's judgment in the case of *Percy* v. *Powell*, (*s*) that the person from whom the information was received should not be the wife of the defendant. "I think," says his Lordship, "this [*391] affidavit is not *sufficient: Mr. Percy does not swear to any threat to go abroad; he only swears to his information and belief; and

(*k*) Roddam v. Hetherington, *ubi supra*. (*l*) Jackson v. Petrie, 10 Ves. 164.
(*m*) *Ante*, p. 383.
(*n*) Beames on Ne Ex. 33; Russell v. Asby, 5 Ves. 96; see also Chapeaurouge v. Carteaux, in a note to Amsinck v. Barklay, 8 Ves. 597.
(*o*) Beames on Ne Ex. 33; Oldham v. Oldham, 7 Ves. 410; Etches v. Lance, 7 Ves. 417; Amsinck v. Barklay, *ubi supra;* Hannay v. M'Entire, 11 Ves. 54; Jones v. Alephsin, 16 Ves. 470; see also Taylor v. Leitch, 1 Dick. 380; and Sherman v. Sherman, 3 Bro. C. C. 370; Hyde v. Whitfield, 19 Ves. 342.
(*p*) Hyde v. Whitfield, *ubi supra*. (*q*) 7 Ves. 410.
(*r*) Collinson v. ———, 18 Ves. 353; Beames on Ne Ex. 34.
(*s*) Beames on Ne Ex. 85.

upon that information, according to the fair construction of the affidavit, he founds his *belief* that the defendant is going abroad. The whole, therefore, depends on his information, which may be true or false: he gives no reason why the party giving him the information, who is not named, does not join in the affidavit, which that party ought to do. (*t*) It is consistent with this affidavit, that he may have his information from Grace Powell, the wife of the defendant; if that is the case, as it has been determined, (*u*) that a wife's affidavit cannot be read to support this sort of application against the husband, it is impossible that another person's affidavit can be sufficient, founding belief on her information without her affidavit."

In a case obtained, by Mr. Beames, from the Registrar's book, Lord Hardwicke granted the writ upon an affidavit, which, after stating that the defendant had denied himself, and kept out of the way, and had sold off his goods, and left his house uninhabited, proceeded thus:—"that the plaintiff, upon inquiry after the defendant, was informed, that one *Mr. Bullock acted as an agent* for him; and that, thereupon, the plaintiff and his solicitor, on, &c., applied to the said Mr. Bullock, who informed the plaintiff, that, unless he would take an assignment of two houses, (to which the defendant pretends he was intitled, if he arrived at the age of thirty,) and give the defendant a discharge for all the moneys he has received, &c., that he will immediately go abroad, and will either take with him the said deeds, writings, &c., or will burn, or destroy the same." (*x*)

The questions, how far it is necessary for the affidavit to allege, that the defendant intends going abroad, *to avoid the jurisdiction*, or that the debt will be endangered by his *quitting the kingdom, have been more than once under discussion. In one instance, Mr. Scott moved the Court to discharge an order for a *ne exeat regno*, on the ground that the affidavit on which it issued, did not go so far as to state, that the plaintiff would be in danger of losing his claim by the defendant's leaving the kingdom; (*y*) but Lord Thurlow said, "that it might have been stronger if the plaintiff had sworn he would be in danger of losing his claim; yet, as the bill was brought for the demand, the defendant's quitting the kingdom, whereby the Court lost its jurisdiction, was a strong implication that it was with a view to avoid it," and therefore refused the motion. (*z*) In two subsequent cases, *Etches* v. *Lance* (*a*) and *Tomlinson* v. *Harrison*, (*b*) the question was again agitated; but the case of *Baker* v. *Haily* does not appear to have, on either occasion, occurred to the Court. The case of *Etches* v. *Lance* stood over, that precedents might be searched; and the result of the examination proving it to have been settled, since the time of Lord Hardwicke, that it is sufficient, if the affidavit alleges that the plaintiff will be in danger of losing the debt, the writ was granted. This doctrine was again acted upon in *Tomlinson* v. *Harrison;* and it may, therefore, be considered as settled, that the affidavit will be sufficient, if it states, that the debt will be endangered by the defendant's quitting the kingdom, without stating that the object is to avoid the jurisdiction. (*c*)

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(*t*) See Hannay v. M'Entire, *ubi supra*, unless he cannot be induced to do so; 18 Ves. 355; Beames on N. E. 35.

(*u*) *Vide* Sedgwick v. Watkins, 3 Bro. C. C. 11; 1 Ves. J. 49, S. C. *et ante*, p. 385.

(*x*) Knight v. Watts, Oc. 31, Reg. lib. A. 1749, fo. 5. The defendant had been appointed by the plaintiff to collect in an intestate's estate, and had the deeds, &c., in his possession for that purpose; *vide* Beames on Ne Ex. 36.

(*y*) *Vide* Beames on Ne Ex. 38, who observes, "The reporter must have mistaken the authorities cited, which do not appear to be in point."

(*z*) Baker v. Haily, 2 Dick. 633. (*a*) 7 Ves. 417.

(*b*) 8 Ves. 33.

(*c*) Stewart v. Graham, 19 Ves. 313; Boehm v. Wood; 1 Turner & Russell, 332.

The order for the writ having been passed and entered, must be delivered to the plaintiff's clerk in Court, who will, thereupon, make out the writ, and get it sealed by the proper officer. The form of the writ is as follows, (*d*) viz:—

[*393] *VICTORIA, &c.—*To our Sheriff of ——, greeting: Whereas it is represented to us in our Court of Chancery, on the part of A. B., complainant, against C. D., defendant, (amongst other things,) that he, the said defendant, is greatly indebted to the said complainant, and designs quickly to go into parts beyond the seas, (as by oath made in that behalf appears,) which tends to the great prejudice and damage of the said complainant, Therefore, in order to prevent this injustice, we do hereby command you, that you do, without delay, cause the said C. D. personally to come before you, and give sufficient bail or security, in the sum of ——, that he, the said C. D., will not go, or attempt to go, into parts beyond the seas, or to Scotland, without leave of our said Court; and, in case the said C. D. shall refuse to give such bail or security, then you are to commit him, the said C. D., to our next prison, there to be kept in safe custody, until he shall do it of his own accord; and when you shall have taken such security, you are forthwith to make and return a certificate thereof to us, in our said Court of Chancery, distinctly and plainly under your seal, together with this writ. Witness ourself at Westminster, the —— day of —— in the —— year of our reign.* (*d*)

The writ must be marked on the back with the amount of the sum for which the defendant is to give security, *in words at length.* (*e*) This is done as a guide to the Sheriff, to take sufficient security, by bail bond, for the defendant's yielding obedience thereto. (*f*)

Where the writ is issued against a personal representative, at the instance of a legatee, or person claiming a share of the residue, it must be marked for the whole amount due from the defendant, not to the plaintiff only, but to all the other persons interested in the estate; (*g*) and it seems, from a case cited by

[*394] Mr. Beames, from the Registrar's book, that the Court will *sometimes extend the amount of the security required, beyond that of the debt sworn to, for the purpose of covering the costs of proceedings at law. (*h*) In *Boehm* v. *Wood* (*i*) also, the writ was marked for the full amount of the purchase money, though the defendant was entitled to an abatement, the amount of which, however, had not been ascertained.

Where the writ has been indorsed for a larger sum than is really due, there is no doubt that the Court will make an order that the security shall be for so much only as is really due, without quashing the writ, and that, too, upon the hearing of a motion to quash it. (*ii*)

(*d*) There are two forms of this writ given in Fitzherbert, one directed to the party himself, and the other to the Sheriff, *vide* F. N. B. 85. In Bernal v. the Marquis of Donegal, 11 Ves. 43, the defendant being intitled to privilege of Parliament, the application was made for the writ in the former form, on the ground that, as the efficacy of the writ did not depend upon any security to be given, or legal restraint of the person, but merely upon the king's command to the defendant not to go to foreign parts, it did not involve any breach of privilege; but Lord Eldon held, that the writ must be in the form usually followed in this Court, and that he had no authority to alter it.

(*d*) Har. ed. Newl. 537; Hinde. 611.
(*e*) Beames on Ne Ex. 93.
(*f*) Hinde. 611.
(*g*) Pannell v. Tayler, T. & R. 100.
(*h*) Bonner v. Worthington and Pink; Beames on Ne Ex. 94; Reg. lib. A. 1819, fo. 12.
(*i*) T. & R. 332.
(*ii*) Pannell v. Tayler, T. & R. 100.

SECTION III.

In what manner executed.

To carry this process into effect, the writ must be delivered to the proper Sheriff, with instructions for executing it. By the terms of the writ, the Sheriff is to cause the party, personally, to come before him, and give sufficient bail or security in the sum indorsed on the writ, that he will not go, or attempt to go, into parts beyond the seas, without leave of the Court, and, on his refusal, he is to commit him to the next prison. (*a*) It is said, that it is an abuse of this process to break open doors, and take the party in bed; however, where this had been done, the Court refused to set him at liberty. (*b*)

It is not necessary to serve a *subpœna* upon the party against whom this writ is issued.

When a caption is made, the defendant, to obtain his discharge out of custody, must execute a bond, with two sufficient sureties, to the Sheriff, in double the sum marked on the writ, conditioned not to go or to attempt to go into parts beyond the seas, or into Scotland, without the leave of the Court. (*c*)

It is said, in a book of practice of considerable authority, that, besides giving bail to the Sheriff, the party arrested must *also, with two sureties of the like description, enter into a recognizance to the Master of [*395] the Rolls and the senior Master in Chancery, in the same sum and upon the like condition as the bond entered into to the Sheriff; (*c*) and other books of authority have laid it down, that a person taken by the Sheriff, on a *ne exeat regno*, must enter into three different bail bonds, before he can be set at liberty; viz: one to the Sheriff, another to the Master of the Rolls, and a third to a Master in Chancery; (*d*) this, however, does not appear to be a correct statement of the practice, according to which there seems to be little doubt that the Sheriff may discharge the party out of custody, upon his giving bail, or security to himself, according to the requisition of the writ, without requiring him to enter into recognizances to the Master of the Rolls and Master in Chancery.

It is to be observed, that the Sheriff is directed by the writ, to cause the defendant to give *sufficient* bail, or security, not to go, or attempt to go, beyond seas, &c. He is, therefore, not bound to take any security but what he may be satisfied is likely to prove effective. Thus, where the writ was marked in the sum of £36,000, and the defendant, after he was taken into custody, tendered to the Sheriff, as a security, the bond of himself and two sureties, in the sum of £36,000, and a deposit of that sum in the Bank of England, in the joint names of the Sheriff and sureties, which the Sheriff refused to accept; and although he afterwards proposed to release the defendant out of custody, upon his finding four sureties, in £36,000 each, yet he ultimately insisted that the £36,000 should be paid into his hands, before the defendant was discharged, Lord Eldon held, that the Sheriff was right in the course he had pursued; "for whatever the Sheriff does, under a writ of *ne exeat regno*, is upon his own responsibility, and what he had done, was merely to require a sufficient security for his having the defendant to produce." (*e*)

From this it appears that, instead of bail, the Sheriff may take a deposit of the amount indorsed upon the writ. (*f*)

(*a*) 1 Turn. & V. 990.
(*b*) Prac. Reg. 290; Curs. Canc. 455.
(*c*) 1 Turn. & V. 990.
(*d*) Prac. Reg. 291; Hinde. 612.
(*e*) Boehm v. Wood, T. & R. 340.
(*f*) *Vide* Bonner v. Worthington, Reg. lib. *ubi supra.*

[*396] *The Sheriff, after he has executed the writ, ought to return it, indorsing upon it a proper return of what he has done. If he has taken bail, it may be in the following form:—"*I have caused the within-named A. B. personally to come before me, and he found bail in the penalty of £———, according to the command of this writ.*" (g)

So, also, if, instead of taking security according to the direction of the writ, he takes a deposit of the amount indorsed on the writ, he should make a return to that effect; and it appears, that where the Sheriff omitted to do so, the Lord Chancellor ordered him to make his return within a given time. (h)

SECTION IV.

In what manner discharged.

After the party has been taken upon the writ, and given security, he must be careful not to go abroad, without previously applying to the Court to discharge it, otherwise the Court, it seems, will order the sureties to pay the money into Court within a certain time, although the defendant's going abroad, was the consequence of a mistake as to the effect of the bond. (a)

The application to discharge the writ may be made either by special motion or by petition, which must be served; if security has been given, the application, besides requiring the discharge of the writ, should pray that the bond should be given up.

If the application is upon the ground that the writ has been irregularly or improperly granted, it may be made before answer, and may be supported by affidavit. (b)

In ordinary cases, however, it seems that the defendant is bound, without *subpœna*, to appear, and, having appeared, he must put in his answer before he can apply to discharge the writ; and cannot be heard upon affidavit, unless [*397] the writ was *issued upon matter arising after the answer had been put in, in which case he may support his application by affidavit. (c)

If, upon an application to discharge or quash the writ on the ground of irregularity, the Court thinks that it has been improperly issued, it will at once order it to be discharged. It will not, however, discharge the writ, merely because it appears to have issued for a sum exceeding that for which it can be sustained; but, in such cases, the amount for which it has been marked will be reduced. (d) Nor will it discharge a writ of this nature, obtained upon affidavits substantiating declarations and acts of the defendant as evidence of his intention to go abroad, upon a counter-affidavit by the defendant denying the intention. (e) In *Jones* v. *Alephsin*, (f) also, the Court refused to quash the writ upon the defendant's affidavit that no debt was due, and that the plaintiff

(g) Impey; Office of Sheriff, Ed. 1835.
(h) Bonner v. Worthington, Reg. lib. A. 1819, fo. 233; cited Beames N. E. 97.
(a) Musgrave v. Medex, 1 Mer. 49; Utten v. Utten, ib. 51.
(b) Grant v. Grant, 3 Russ. 598—602; *et vide* Hyde v. Whitfield, 19 Ves. 342; Flack v. Holm, 1 J. & W. 414.
(c) Russell v. Asby, 5 Ves. 98; *vide* Boehm v. Wood, T. & R. 332; *vide etiam* 15 Vin. Ab. p. 539, tit. Ne exeat regnum, pl. 6.
(d) Grant v. Grant, 3 Russ. 599. (e) Amsinck v. Barklay, 8 Ves. 594.
(f) 16 Ves. 470.

had made admission to that effect, the plaintiff having, by his affidavit, sworn positively to there being a debt.

The Court will discharge the writ upon merits, whenever it appears, by the circumstances of the case, as disclosed by the affidavits upon which it was granted and the answer of the defendant, either that the plaintiff has no case, or that the defendant is not going out of the jurisdiction, (*g*) and this it will do either absolutely or conditionally, *i. e.* upon the defendant's giving security to abide and perform the decree of the Court; for which purpose it will refer it to the Master to approve of the proper security. (*h*)

The Court will, also, discharge a *ne exeat regno*, upon the defendant's paying into Court the sum for which the writ is marked. (*i*)

It may be observed here, that the order directing the writ to issue, generally directs that the defendant shall be restrained from going abroad, until answer and *further order;* the Court, *therefore, will not discharge the writ merely upon the coming in of the answer, if it appears, upon [*398] the merits of the case, that there will be necessarily decreed things for the defendant to do at the hearing. (*k*)

It has also been decided, that a surety on a writ of *ne exeat regno* shall not be discharged upon the principal's putting in his answer, nor even upon such principal being, by a subsequent process of the Court, committed to prison, the Court observing, that the surety was then in no danger. (*l*) In a recent case, the sureties applied to be discharged, on the ground that the defendant was in custody for want of an answer; but Lord C. Eldon refused to discharge them, observing, that there was no instance of it; on the contrary, that in a late case, the Court had refused to discharge them. (*m*)

The applications in *Le Clea* v. *Trot*, and *Stapylton* v. *Peile*, were *previous to the decree:* but where, *after a decree* against the defendant for the same matter as that for which the writ of *ne exeat regno* issued, the defendant being in contempt, and in custody for not performing the decree, the sureties applied for that purpose, they obtained an order that they should be discharged, and the bond as to them cancelled. (*n*)

(*g*) Leo v. Lambert, 3 Russ. 417.

(*h*) Roddam v. Hetherington, 5 Ves. 91; Boon v. Collingwood, 1 Dick. 115; Atkinson v. Leonard, 3 Bro. C. C. 223.

(*i*) Evans v. Evans, 1 Ves. J. 96; Stewart v. Graham, 19 Ves. 314; Dick v. Swinton, 1 V. & B. 373.

(*k*) Atkinson v. Bedel, 1 Dick. 98.

(*l*) Le Clea v. Trot, Prec. in Ch. 230. In a MS. in Mr. Beames's possession, written by Sir George Carey, the Master in Chancery, and author of the small volume of reports which passes under his name, there is the following passage:—"A bail in this Court, or in the civil law, is not discharged upon bringing in the principal, as he is at common law. Archepoole *contra* Burrell, Michas. 23 & 24 Eliz." But Tothill's note of Archboll v. Burrell, which seems to be the same case as Sir George Carey mentions under the name of Archepoole *contra* Burrell, is simply in these words:—"A bail in this Court, or in the civil law, is discharged upon bringing in the principal, as he may at the common law." Tothill, p. 17, and see Griffith v. Griffith, 2 Ves. 400.

(*m*) Stapylton v. Peile, 27 June, 1816; cited Beames's Ne Ex. 84.

(*n*) Debazin v. Debazin, 1 Dick. 95. The defendant, an executor, was, immediately after filing of the bill, arrested on the ne exeat. He gave security for £450; two persons, of the names of Randeau and Tonsey, being his bail to the Sheriff upon the writ. Afterwards, a decree was pronounced in favour of the plaintiff, with costs. A writ of execution of the decree was issued, which was followed by an attachment for non-performance. On this attachment the defendant was arrested, and committed to the Fleet, "for the same matter for which the said ne exeat issued, as appears by the certificate of the Warden of the Fleet." The sureties, Randeau and Tonsey, applied to be discharged, &c., and an order was pronounced, "that the said Randeau and Tonsey, the defendant's two sureties, who

[*399] *In the case of *Baker* v. *Jefferies*, (*o*) the Court discharged the recognizance entered into by the defendant and her two sureties, on a writ of *ne exeat regno*, for £2000, on the ground that the defendant had paid the £2000 to the plaintiff, notwithstanding it appeared by the Master's report, that much more than the £2000 was due from the defendant to the plaintiff. (*p*)

It may be noticed here, that the Court will not discharge a *ne exeat regno* on the mere ground that, since the writ was ordered the plaintiff has amended his bill, unless it can be shewn, that the amendments have varied the case, as originally stated; the Court, therefore, will not make a special order giving the plaintiff liberty to amend, "without prejudice to the *ne exeat*," but will leave it to him to obtain the common order, if he thinks he can do so with safety. (*q*)

[*400]

*CHAPTER XXXIV.

OF RECEIVERS.

SECT. I.—*In what Cases appointed.*

A Receiver is an indifferent person, between the parties, appointed by the Court to receive the rents, issues, and profits of lands, or other thing in question, in this Court, pending the suit, where it does not seem reasonable to the Court that either party should do it: he is to account for such receipt when the Court shall require him, and, to secure his doing so, he is commonly ordered to enter into a recognizance, with sureties. (*a*)

The appointment of a Receiver is a matter resting in the discretion of the Court; (*b*) and the Receiver, when appointed, is treated as virtually an officer and representative of the Court, and subject to its orders. (*c*) Lord Hardwicke considered this power of appointment to be of great importance and most beneficial tendency, and said—"It is a discretionary power exercised by the Court, with as great utility to the subject, as any authority which belongs to it; and is provisional only for the more speedy getting in of a party's estate, and securing it for the benefit of such persons who shall appear to be entitled, and does not at all affect the right. (*d*)

The most ordinary cases in which Receivers are granted by the Court, are [*401] those in which the suit arises out of claims by *parties having equitable interests in the subject; in such cases the Court will

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entered into the said bail bond for the defendant Debazin, on the said writ of ne exeat, be discharged, and that the said bond as to them be cancelled." Debazin v. Debazin, Reg. lib. A. 1743, fo. 64.

(*o*) 2 Cox, 228.

(*p*) Beames, Ne Ex. 86.

(*q*) Grant v. Grant, 5 Russ. 189.

(*a*) Prac. Reg. 355, 356; 2 Harr. Ed. Newl. 499.

(*b*) Skip v. Harwood, 3 Atk. 564.

(*c*) Angel v. Smith, 9 Ves. 338; Hutchinson v. Massarene, 2 B. & B. 55; Jeremy on Eq. Jur. 248, 249.

(*d*) Skip v. Harwood, 3 Atk. 564; Story's Comment. ch. 21, pl. 831.

appoint a Receiver, for the purpose of protecting the property till the question between the parties shall have been determined. And in general, it may be taken as a rule, that where the legal estate is vested in an individual claiming an interest paramount to that of the litigant parties, so that the litigant parties can only have equitable interest, the Court will grant a Receiver, although, in doing so, it will always take care not to interfere with the rights of the party having the prior estate: therefore where a man has an equitable mortgage, "that is if there is a prior mortgagee, then, if the prior mortgagee is not in possession, the other may have a Receiver, without prejudice to his taking possession." (*e*) In *Berney* v. *Sewell*, (*f*) Lord Eldon says, "I remember a case, where it was much discussed, whether the Court would appoint a Receiver, where it appeared, by the bill, that there was a prior mortgagee who was not in possession: I have a note of that case; there Lord Thurlow made the appointment, without prejudice to the first mortgagee taking possession, and that was afterwards followed by Lord Kenyon." (*ff*)

The same principle is applied to other equitable creditors, (*g*) and indeed to all other persons having mere equitable estates. The rule, with respect to equitable creditors, is thus laid down by Lord Eldon in *Davis* v. *The Duke of Marlborough* (*h*)—"The rule, I take to be, that the Court will, on motion, appoint a Receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons who have prior legal estates;—in this sense, without prejudice to persons having prior legal estates, that it will not prevent their proceeding to *obtain possession, if they think proper: (*i*) and with regard to persons having prior equitable estates, the Court [*402] takes care, in appointing a Receiver, not to disturb prior equities; and, for that purpose, directs inquiries, to determine priorities among equitable incumbrancers, permitting legal creditors to act as against the estates at law, and settling the priorities of equitable incumbrancers. Provided it is satisfied, in that stage of the cause, that the relief prayed by the bill will be given when the decree is pronounced, the Court will not expose parties claiming that relief, to the danger of losing the rents, by not appointing a Receiver of an estate, on which it is admitted that they cannot enter." (*k*) And here it may be remarked, that, although, where there is a prior mortgagee in existence having the legal estate, the Court will not, by the appointment of a Receiver, deprive him of his right to possession, the Court will not permit him to object to the appoint-

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(*e*) 1 J. & W. 648. (*f*) 1 J. & W. 649.

(*ff*) In Phipps v. the Bishop of Bath and Wells, as reported in 2 Dick. 608, Lord Thurlow refused the appointment of a Receiver at the instance of a second mortgagee, the first not being in possession; but, in Bryan v. Cormick, 1 Cox, 423, he came to the determination mentioned above; a similar order was made in Dalmer v. Dashwood, 2 Cox, 378. In Norway v. Rowe, 19 Ves. 153, the Lord Chancellor states it to be the practice, on motions for Receivers, not to look at mortgagees further than to take care that they are not prejudiced, see Price v. Williams, Coop. 31, and Brooks v. Greathed, 1 J. & W. 176.

(*g*) *Vide* Curling v. Marquis Townshend, 19 Ves. 628.

(*h*) 2 Swanst. 108, 137.

(*i*) *Vide* Dalmer v. Dashwood, 2 Cox, 382, but they must first obtain leave of the Court. Bryan v. Cormick, 1 Cox, 422; Anon. 6 Ves. 287; Angel v. Smith, 9 Ves. 335; Brooks v. Greathed, 1 J. & W. 176; Gresley v. Adderley, 1 Swanst. 579, *et vide post.*

(*k*) It seems to have been considered, by the reporter in Price v. Williams, (Coop. 31,) that Sir Thomas Plumer's opinion was, that if it appears, by the pleadings, that there is a prior mortgage, the Court will not appoint a Receiver unless the mortgagee is a party to the suit, which would have been at variance with the general practice of the Court. Sir Thomas Plumer's objection to the appointment, in that case, must, therefore, have been founded on the fact that the mortgagee was also a *cestui que trust* under the will, in which character he was a necessary party, though in the mere character of mortgagee he was not so.

ment of a Receiver by any act short of a personal assertion of his legal right, and taking possession himself. (*l*) And if, after a Receiver has been appointed, he does not think proper to avail himself of his legal right, (which he may do by applying to be examined *pro interesse suo*) he will not be permitted to have the benefit of the Receiver, (*ll*)—the appointment of a Receiver being for the benefit of incumbrancers, so far, only, as expressed to be for their benefit, and as they choose to avail themselves of it. (*m*)

[*403] *It may be mentioned here, that the Court will grant a Receiver at the instance of a second incumbrancer, in all cases in which the first incumbrancer is not in possession of the property, and that the circumstance of the party creating the incumbrance being abroad, and refusing to appear to the suit, will not deprive the mortgagee of his right to possession. (*n*) In *Holmes* v. *Bell*, (*o*) however, Lord Langdale, M. R., appears to have entertained some doubt as to his power to appoint a Receiver, where one of two mortgagees, who were tenants in common, was abroad, at least so far as regarded the moiety of the absent party, although he thought the objection removed by the circumstance of the mortgagee, who was in England, being in the possession of the whole estate. His Lordship's difficulty appears to have arisen from *Browne* v. *Blount*, (*p*) in which the Master of the Rolls, Sir J. Leach, refused to appoint a Receiver in the absence of the owner of the estate; but it is to be observed, that the determination, in that case, was not come to upon an interlocutory application, but upon the hearing of the cause; on which occasion, it having been concluded that the Court could not proceed to make a decree in the absence of the party beneficially interested, it was urged that, although it could not grant the relief prayed, it would go the length of appointing a Receiver.

It may be mentioned here, that, in a recent case, Sir L. Shadwell, V. C., appears to have granted a Receiver against a defendant who was out of the jurisdiction of the Court. (*q*) And that in *Pitcher* v. *Helliar*, (*r*) a Receiver was appointed upon affidavit that the defendant had absconded to avoid being served with a *subpœna*.

But although the Court will, in general, grant a Receiver, at the instance of a party having an equitable estate, when the individual having a prior legal estate is not in possession, it will not, unless under very particular circumstances,

[*404] appoint one *where the party having the legal estate is in actual possession of the property. (*s*) Thus although a second mortgagee may have a Receiver, where the first is not in possession, yet if the first mort-

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(*l*) Silver v. the Bishop of Norwich, 3 Swanst. 112, n. 115.

(*ll*) *Vide* Anon. 6 Ves. 287; Angel v. Smith, 9 Ves. 336; Brooks v. Greathed, 1 J. & W. 178; Hunt v. Priest, 2 Dick. 540; *Ante*, vol. 1, 644, *et post.*

(*m*) Gresley v. Adderley, 1 Swanst. 579.

(*n*) Tanfield v. Irvine, 2 Russ. 149; *sed vide et quere* Coward v. Chadwicke, ib. p. 150, (n.)

(*o*) 2 Beav. 298. (*p*) 2 R. & M. 83.

(*q*) Gibbins v. Mainwearing, 9 Sim. 77.

(*r*) 2 Dick. 580; *vide etiam*, Maquire v. Allen, 1 B. & B. 75.

(*s*) It seems that this rule will not apply where the party in possession is merely so upon execution, under a judgment, and that in such cases, a creditor having taken out execution, cannot hold property against an estate created prior to his debt; *vide* 3 Swanst. 117. Upon this principle, Lord Eldon made an order for the appointment of a Receiver of the rents and profits of a rectory, at the instance of a second incumbrancer although a third incumbrancer was in possession under a sequestration from the Bishop, which his Lordship considered, in contemplation of this Court, as equal to a judgment; White v. Bishop of Peterborough, 3 Swanst. 109. As between equitable creditors and judgment creditors, having possession under writs of *elegit*, it is competent to the Court to appoint a Receiver in favour of the equitable creditors, not disturbing the *just rights* of any of the judgment creditors in possession; Davis v. Duke of Marlborough, 1 Swanst. 74.

gagee is in actual possession of the estate, a Receiver will not be appointed, unless indeed it is shewn that the first mortgagee has been paid off, in which case a Receiver may be appointed on the application of a subsequent incumbrancer. (*t*)

It is to be understood, that, in order to defeat an equitable mortgagee of his right to a Receiver, the possession of the party must be such a possession as invests him with a title to receive the rents and profits; a mere possession as tenant will not be sufficient; and where one of the defendants, who was in the occupation of part of the estate as tenant, and had purchased of the plaintiff a part of his mortgage, the interest of which was about equal to the rent of his occupation, the Court of Exchequer held that he could not unite his two characters of mortgagee and tenant, and that his possession, being as tenant, could not be set up against the other mortgagee. (*u*)

And here it may be remarked, that as between mortgagees in possession and persons having subsequent interests, the Court will not appoint a Receiver against a mortgagee's own oath that something is due to him, (*x*) unless the party making the application will offer to pay him off, according to his demand, *as he states it himself; in which case, if the party will bring the [*405] mortgagee's own confession, that he has been paid off, or that he has refused to accept what is due to him, the Receiver will be appointed. (*y*)

For this purpose the Court will require the mortgagee to state upon his oath, what he believes to be due; and in taking the possession from him upon payment of what he swears to be due, it will make him give security to refund, if it shall appear, upon the account, that so much is not due, and where he will not swear that anything is due, the Court will appoint a Receiver. (*z*)

It is to be observed, that the disinclination of the Court to appoint a Receiver, where the property is in possession of a party having the legal estate, is felt in those cases only in which the estate of the party in possession is prior to that of the parties to the litigation; where the right to the possession is the subject of dispute, and the plaintiff having an equitable interest claims the legal estate from the defendant in possession, there the Court will, if it sees clearly that the plaintiff has the right, and that the ultimate decree will be in his favour, appoint a Receiver pending the suit.

This was done in *Metcalfe* v. *Pulvertoft*, (*a*) at the instance of a purchaser *pendente lite*, the Court being satisfied that the contract was one which it could enforce.

So, also, where the defendant, on an advance of money by the plaintiff, agreed to execute a mortgage of certain lands, but did not perform the agreement, and there was an arrear of interest due on the money advanced, upon which the plaintiff filed a bill for a specific performance, the Vice Chancellor appointed a Receiver. (*b*)

In like manner, where a tenant in tail in remainder, upon an advance of money to him by the plaintiff, had agreed to repay it after the death and failure of issue of his brother, the tenant in tail in possession, and had secured the money by a *mortgage of the estate, and a covenant to levy a fine [*406] and suffer a recovery to give effect to the mortgage, but, on coming into possession of the estate, refused to perform his covenant, the Court appointed a Receiver of the rents. (*c*)

(*t*) *Vide* Quarrell v. Beckford, 13 Ves. 377; Codrington v. Parker, 16 Ves. 469; Berney v. Sewell, 1 J. & W. 647.
(*u*) Archdeacon v. Bowes, 3 Anst. 752.
(*x*) Rowe v. Wood, 2 J. & W. 553.
(*y*) Berney v. Sewell, 1 J. & W. 746.
(*z*) Chambers v. Goldwin, cited 13 Ves. 377; Quarrell v. Beckford, ib.
(*a*) 1 V. & B. 180.
(*b*) Shakel v. Duke of Malborough, 4 Mad. 463.
(*c*) Free v. Hinde, 2 Sim. 7.

Upon the same principle, where a bill was filed by creditors claiming satisfaction out of real and personal assets, and it appeared, by the answer of the person in possession of the real estate, that the real estate must eventually be responsible, as there was no personal estate to be applied to discharge debts, the Court appointed a Receiver in the first instance. (*d*)

The Court will also appoint a Receiver against a party having possession under a legal title if it can be satisfied that such party is wrongfully entitled to such legal estate. Thus where fraud can be clearly proved and immediate danger is likely to result if the intermediate possession should not be taken under the care of the Court, a Receiver will be appointed. (*e*) This rule was recognized by Lord Eldon in *Lloyd* v. *Passingham*. (*f*) "The Court interferes," observes his Lordship, "by appointing a Receiver, with great reluctance; compelled by judicial necessity, the effect of fraud clearly proved, and immediate danger if the intermediate possession should not be taken under the care of the Court." In order, however, to induce the Court thus to interfere, it is, according to his Lordship's subsequent remarks, not only necessary that the Court should be satisfied of the existence of fraud, but it must be morally sure that, upon the hearing of the cause, the party would upon the circumstances be turned out of possession; and not only that, but it must see some danger to the intermediate rents and profits. (*g*) His Lordship, in that case, did not conceive that, the circumstances disclosed, formed that extreme case in which the possession was to be taken from those who had the legal right; but in a more recent case, *Stilwell* v. *Wilkins*, (*h*) where a bill was filed for the purpose of setting aside *a purchase, and the answer of the defendants, who were the devisees of the purchaser, admitted the great inadequacy of the price, but stated their ignorance of the other circumstances of fraud alleged; his Lordship granted the Receiver, because, "if the case stated were true, the inadequacy was so monstrous, and the situation of the young man and the state of his intellect were such, that it was hardly possible to suppose that the transaction could stand:" he thought, therefore, that it was a case in which such an order might be made, though it was not in accordance with the general habit of the Court.

[*407]

Upon the same principle, the Court interferred in *Podmore* v. *Gunning*. (*i*) In that case a testator, by his will, bequeathed the residue of his real and personal estate to his wife, "having perfect confidence that she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease," and, upon the wife's dying without a will, the Court appointed a Receiver, upon an allegation in the bill, (supported by affidavit,) of a promise by the wife to her husband, on the faith of which he had made his will, that she would bequeath the residue of his property, after her decease, to the plaintiffs, who were his natural children.

It is to be observed that, in the above cases, there were circumstances of either actual or constructive fraud, as well as of title, to induce the Court to interfere; where these circumstances are absent, and there is no case of spoliation, the Court will not appoint a Receiver upon mere ground of title in the plaintiff. (*k*)

(*d*) Jones v. Pugh, 8 Ves. 71; Fingal, Earl of, v. Blake, 2 Moll. 52.
(*e*) Lloyd v. Passingham, 16 Ves. 59; Hugonin v. Baseley, 13 Ves. 105.
(*f*) *Ubi supra.*
(*g*) Lloyd v. Passingham, 16 Ves. 70; *vide* Hugonin v. Baseley, *ubi supra.*
(*h*) Jac. 280; *vide* 6 Mad. 49, S. C., sub nomine Stilwell v. Williams.
(*i*) 5 Sim. 485.
(*k*) Toldervy v. Colt, 1 Younge, & Coll. 621.

But although the Court will not interfere upon the mere ground of title, it will appoint a Receiver at the instance of parties beneficially interested, even where there is no fraud or spoliation, provided it can be satisfactorily established that there is danger to the estate or fund, unless such a step is taken. Thus, in the case of executors, if the executor has wasted the effects, or in other respects misconducted himself, the Court will interfere by the appointment of a Receiver; (*l*) upon this *ground, also, where an executor has not done what he can to get in the personal estate, the Court will order a Receiver to be appointed. (*m*) [*408]

But although a Receiver will be appointed as against an executor, where it is shewn that there is a probability of danger to the property, it must be such danger as arises from the misconduct or neglect of the party,—mere property will not, of itself, constitute a sufficient ground for such an appointment. (*n*) Where, however, an executrix, who had been appointed guardian of her three children, by her husband, married a second husband in necessitous circumstances, the House of Lords directed a Receiver to be appointed to get in the outstanding personal estate. (*o*) And where the husband of a woman, who had been appointed executrix, was in the West Indies, and was sworn to be in indifferent circumstances, a Receiver was also appointed. (*p*) It appears, however, from the report of that case, as if a principal ground for granting the Receiver had been the fact of the husband being in the West Indies, and not amenable to the process of the Court; but, in a more recent case of a similar nature, the Court of Exchequer made the order, upon the proof of the husband's insolvency, though the affidavit positively denied the fact of his being abroad. (*q*) And, in general, it may be assumed that, in a case where a personal representative is actually insolvent, a Receiver will be appointed; therefore, if an executor has become bankrupt, or has taken the benefit of the Act for the Relief of Insolvent Debtors, the Court will appoint a Receiver; and if it should be necessary to bring actions at law to recover part of the effects, since that must be in the name of the executor, the Court will compel him to allow his name to be used. (*r*) It seems, however, to be doubtful, whether, if a person, known by a testator *to be a bankrupt or insolvent, be appointed an executor by his will, such person can be controlled by the appointment of a Receiver; (*s*) but it is not to be inferred, from the circumstance of the will having been made some time before the commission issued, and not altered afterwards, that the testator had a deliberate intention to intrust the management of his estate to an insolvent executor. (*t*) [*409]

It is to be mentioned here, that, in a recent case, the Court of Exchequer held, that the circumstance that the party who had the administration of the testator's effects was an uncertificated bankrupt; and was not appointed to the office by the testator, was not a sufficient ground for the appointment of a Receiver *before answer*, where several of the parties interested had refused to join in the application. (*u*)

(*l*) Anon. 12 Ves. 5; Middleton v. Dodswell, 13 Ves. 268; *vide etiam*, Havers v. Havers, Barnardist. 22.

(*m*) Richards v. Perkins, 3 Y. & C. 299.

(*n*) Hathornwaite v. Russell, 2 Atk. 126; Howard v. Papera, 1 Mad. 142; Anon. 12 Ves. 4.

(*o*) Dillon v. Lady Mount Cashell, 4 Bro. P. C. ed. Toml. 306—12.

(*p*) Taylor v. Allen, 2 Atk. 213. (*q*) Scott v. Becher, 4 Pri. 346.

(*r*) Utterson v. Mair, 2 Ves. J. 95; 4 Bro. C. C. 269, S. C.; Scott v. Becher, *ubi supra*.

(*s*) Gladdon v. Stoneman, 1 Mad. 143, n.; Langley v. Hawk, 5 Mad. 46.

(*t*) Ibid. Williams on Executors (ed. 3;) vol. 1 p. 169.

(*u*) Smith v. Smith, 2 Y. & C. 353.

The same grounds which will induce the Court to take away from an executor the possession, or the right to the possession, of the testator's property, by the appointment of a Receiver, in case of his misconduct or of his bankruptcy or insolvency, will induce the Court to interfere in the case of any party clothed with the character of a trustee, and that whether he is a mere trustee or a trustee having an interest in the estate or fund.

Thus where a trustee refuses to act, the Court will, on the application of the persons beneficially interested, appoint a Receiver; (*x*) and so where several trustees under a settlement, in consequence of disputes amongst themselves, permitted the rents of the trust estate to fall in arrear, the Court not only appointed a Receiver to collect the rents, but ordered the costs of the suit to be paid by the trustees. (*y*)

It may be observed, that although the Court will, in general, where there has been a clear breach of trust on the part of a trustee, interfere to take the possession from him pending the suit in which the discussion of his conduct is involved, it will *not, where property has been applied without complaint for a long series of years, according to an uniform course of management which has been sanctioned by the parties beneficially interested, appoint a Receiver by interlocutory order, on the ground that such application of property is a breach of trust, unless it is perfectly clear that the party in whom the property is vested is a mere naked trustee, and has not, even to a limited extent, any of the rights and interests of an owner. Upon this ground, a motion for the appointment of a Receiver of the estates vested in the *Irish Society* at the instance of one of the London companies, who claimed a beneficial interest in the income of the estates, was refused. (*z*)

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With reference to the effect of acquiescence on the part of those beneficially interested, as a ground for the Court refraining from disturbing the possession by the appointment of a Receiver, it may be mentioned that the subject was much discussed in *Gray* v. *Chaplin*. (*a*) In that case, the commissioners of a canal had made an agreement for letting the tolls, which was not warranted by the act under which they derived their authority, and was prejudicial to an interest expressly reserved, by the act, to the public; this agreement was acquiesced in without complaint by the shareholders, for forty-seven years, during which period the lessee remained in undisturbed possession of the tolls, and, upon a suit instituted by some of the shareholders, on behalf of themselves and others, to set aside the agreement, and for a Receiver, Lord Eldon discharged an order for a Receiver of the tolls, which had been made by the Vice Chancellor.

It is to be observed that, in cases of misconduct by trustees, either by *misfeazance* or *nonfeazance*, the Court will appoint a Receiver, as well in cases in which the trust arises by implication, as in those where it is expressed. Upon this principle, the Court has held, that where a man takes a conveyance of a legal estate subject to equitable interests, he must satisfy those interests or submit to a Receiver; therefore, where a man purchased lands which were subject to *two equitable annuities, which he refused to pay, Lord Eldon expressed his determination to appoint a Receiver, unless the defendant would enter into an undertaking to pay the annuities. (*b*)

[*411]

Upon the same principle, if a tenant for life of leaseholds is bound to renew, he is, in such case, clothed with the character of trustee; and if by his threats or acts he manifests an intention to suffer the lease to expire, the Court will appoint a Receiver in order to provide a fund for renewal; (*c*) and if a tenant

(*x*) Brodie v. Barry, 3 Mer. 695. (*y*) Wilson v. Wilson, 2 Keen. 249.
(*z*) Skinners' Company v. Irish Society, 1 M. & C. 162.
(*a*) 2 Russ. 126. (*b*) Pritchard v. Fleetwood, 1 Mer. 54.
(*c*) *Vide* Bennett v. Colley, 2 M. & K. 225, 233, and 5 Sim. 192, S. C.

for life has already allowed the period of renewal to pass, the rents and profits will be sequestered either for procuring a renewal or finding the remainder-man a compensation. (*d*)

Upon the same ground, the Court of Chancery in Ireland has appointed a Receiver to provide a fund for the payment of the interest and costs due to a purchaser, who had been discharged on a report that a good title could not be made, and there was no fund in Court out of which such interest and costs could be paid. (*f*)

It may be mentioned here, that a similar order for the appointment of a Receiver of the rents and profits of an estate, for the purpose of accumulating a fund, was made by Sir L. Shadwell, V. C., in a recent case where the party had fraudulently obtained a sum of money, to which the trustees of her settlement were entitled. (*g*) The circumstances of the case are very peculiar, and are shortly as follows: on the marriage of Sir Nigel and Lady Gresley, certain estates of which she was seised, together with her interest in a sum of £2609 Old South Sea Annuities standing in the name of the Accountant General, in a cause of *Ross* v. *Berrow*, to which the lady was intitled in reversion, expectant on the deaths of her mother and aunt, were conveyed to trustees, in trust for Lady Gresley for life, with remainder in trust for the *younger [*412] children of the marriage; and, by another deed, Sir Nigel Gresley granted, out of his own estates, a rent-charge of £800 to Lady G., for her life. After Sir Nigel Gresley's death, Lady Gresley, unknown to the trustees of her settlement, obtained an order in the cause of *Ross* v. *Berrow*, (her mother and aunt being both dead,) for the transfer of the £2609 South Sea Annuities to herself, and she afterwards assigned her life interest in her own estates, and in the rent-charge of £800 over Sir Nigel's estates, to her son Sir Roger Gresley, as a security for £5000 which he had advanced on her account. Upon the fraud committed by Lady G. being discovered, a bill was filed by the parties entitled, under the settlement, to the £2609 South Sea Annuities and to the rents of Lady Gresley's estate, asking for a declaration that the obtaining of the £2609 stock, by Lady Gresley, was a fraud upon her marriage settlement, and that she was therefore not entitled to receive the rents of the estates comprised in the settlement, or to the rent-charge of £800 granted out of the estates of Sir Nigel Gresley, and that these rents and the rent-charge had become immediately applicable to replace the stock, and praying that the assignment to Sir Roger Gresley might be postponed to the right of the plaintiffs to have the rents and profits and rent-charge applied in the manner stated; and, upon a motion being made before answer, for an injunction and Receiver, which was supported by affidavits shewing that, before the assignment to him, Sir Roger Gresley had notice of the fraud which had been committed by his mother, the Vice Chancellor held that the Court was called on to interfere, as soon as it could, to have the fund which Lady Gresley had abstracted restored, and granted the motion.

As the object of appointing a Receiver is, usually, the preservation and protection of the property in dispute pending a litigation, the Court will not appoint a Receiver on the application of a party who possesses the power of protecting the property without it; consequently, a Receiver will not be appointed on behalf of a mortgagee who has the legal estate, as he has nothing to do but to take possession. (*h*)

(*d*) *Vide* Lord Montford v. Lord Cadogan, 17 Ves. 485.

(*f*) Hill v. Kirwan, 1 Hog. 178. The usual course, however, in such cases is to order the costs to paid by the plaintiff, without reference to the question, how they are to be ultimately satisfied. *Ante*, vol. 2, p. 911.

(*g*) Woodyatt v. Gresley, 8 Sim. 180. (*h*) Berney v. Sewell, 1 J. & W. 647.

[*413] *So, also, where one of the plaintiffs was a trustee of the estate with a power of entry and distress, Lord Eldon discharged an order appointing a Receiver; (*i*) and it may be laid down as a rule, arising from the same principle, that wherever there is a dispute respecting an estate which depends upon a mere legal title, the Court will not, in general, grant a Receiver, because the plaintiff has his remedy by asserting his title in a Court of Law. (*k*)

Thus where an heir-at-law disputes a will against the devisees in possession, the Court will refuse a Receiver, although there may be a dispute in the Ecclesiastical Court concerning probate: because he may, if he is intitled as heir, bring his ejectment against the devisees. (*l*)

This rule, however, is departed from where there are peculiar circumstances in the case, as where the Court sees that it is clear, from the evidence produced, that there is no ground to impeach the will, or the heir throws a doubt upon his own title by moving to postpone the trial. (*m*)

So also a Receiver will be appointed where it is shown to be important that the Court should interfere for the protection of the estate or of the rents and profits. Thus where it can be established that there is danger of the interim rents being lost, from the refusal of a tenant to pay them, the Court will appoint a Receiver; (*n*) but there must be a strong case shewn of danger to the intermediate rents, there must be also a strong ground of title in the plaintiff. (*o*)

The Court will likewise extend the application of the principle of providing for the safety of property pending a litigation, to cases where the litigation is in another Court; thus during a litigation in the Ecclesiastical Court for probate

[*414] or administration, *a Court of Equity will entertain a bill for the mere preservation of the property of the deceased, till the litigation is determined, and appoint a Receiver, although the Ecclesiastical Court, by granting an administration *pendente lite*, might provide for the collection of the effects. (*p*) And a Court of Equity will appoint a Receiver, as well when the litigation in the Ecclesiastical Court is to recall administration or probate already granted, as in a case where no administration has been granted before the application to the Court of Chancery. (*q*) But the mere circumstance that there has been a suit instituted in the Ecclesiastical Court to recall a probate already granted, does not give the Court of Chancery jurisdiction to interfere; for if that were so, it is evident that, in order to obtain a Receiver, it would be only necessary to institute a suit in the Ecclesiastical Court. (*r*) The Court of Chancery, therefore, will look into the case, to see whether, on the whole, such a case is made as justifies its interference; and it should seem, that if it appears, from all the circumstances, that there is substantially a *lis pendens* in the Ecclesiastical Court, a Receiver may be appointed notwithstanding there is no ground

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(*i*) Buxton v. Monkhouse, Coop. 41. (*k*) Mordaunt v. Hooper, Amb. 311.

(*l*) Knight v. Duplessis. 1 Ves. 325; Fingal, Earl of, v. Blake, 1 Moll. 158; 2 Moll. 50; *vide etiam*, Lloyd v. Trimleston, 2 Moll. 81.

(*m*) Fingal v. Blake, *ubi supra*. It is to be observed, that, the evidence to satisfy the Court in such a case, must be that which is afforded by the answer or affidavits, the Court will not before hearing make an order for a Receiver upon the depositions in the cause, Lloyd v. Passingham, 3 Mer. 697.

(*n*) Ibid. (*o*) Mordaunt v. Hooper, *ubi supra*.

(*p*) Lord Red. 4th ed. 135, 136; King v. King, 6 Ves. 172; Edmunds v. Bird, 1 V. & B. 542; Atkinson v. Henshaw, 2 V. & B. 85; Ball v. Oliver, ib. 96; Watkins v. Brent, 1 M. & C. 102, over-ruling the distinction taken by Lord Erskine, in Richards v. Chave, 12 Ves. 462.

(*q*) Rutherford v. Douglas, 1 S. & S. 111, n (*d*), Ball v. Oliver, *ubi supra*.

(*r*) Watkins v. Brent, 1 M. & C. 97; see also, Knight v. Duplessis, 1 Ves. 324, and a MS. case argued on demurrer, 13th June, 1812, cited in 1 Mad. Chan. 225, n. 1, 2nd ed. Dew v. Clarke, 1 S. & S. 114.

laid for the interference of the Court of Chancery in respect of any improper conduct of the parties. (*s*)

In *Jones* v. *Frost*, (*t*) where, a bill, for the appointment of Receiver, merely alleged, that the Ecclesiastical Court had set aside, on the ground of fraud, a pretended will set up by the defendants, and that the defendants opposed the application which the plaintiffs were then making for letters of administration, without stating what were the grounds of opposition, a demurrer was allowed by Sir John Leach, V. C., because nothing appeared on the bill to show that the plaintiff might not, in due course, *have obtained the administration. But in *Marr* v. *Littlewood*, (*u*) Lord Cottenham granted [*415] a Receiver, at the instance of an executor, pending a suit in the Ecclesiastical Court to have the probate annulled; the defendant, who was the party impeaching the will and setting up an intestacy, having by her own acts prevented the executor from getting in the assets; and his Lordship observed, that in *Jones* v. *Frost* it did not sufficiently appear that there was a litigation pending in the Ecclesiastical Court, whereas, in the present case, unquestionably such a litigation was then depending between the parties; and it was solely by the act of the party prosecuting that litigation, that the legal power of the plaintiff had been rendered unavailing. (*x*)

The Court will also grant a Receiver, pending an appeal to the Privy Council from a decision of the Ecclesiastical Court upon the validity of a will, there being no power in the Privy Council to protect the property pending the appeal: thus in *Day* v. *Croft*, (*y*) where there was a suit in the Ecclesiastical Court as to the validity of an appointment by a codicil of a *Mr. Dufour* to be an executor, and the Court decided against the codicil, and displaced *Mr. Dufour's* title—upon Mr. Dufour's appealing to the Privy Council, an inhibition was issued to restrain the Ecclesiastical Court from further proceedings; and upon a bill by the persons interested under the will, the Court appointed a Receiver, on the ground of their being no person to protect the property, and no power elsewhere to appoint one. So, also, in *Wood* v. *Hitchings*, (*z*) where the Ecclesiastical Court had by its sentence rejected the testamentary paper of the deceased and declared for an intestacy, whereupon the parties interested under the will appealed to the Privy Council, which inhibited the Ecclesiastical Court from proceeding, Lord Langdale, M. R., whose opinion was afterwards confirmed by Lord Cottenham (*a*) held, that the circumstance of there being no person authorized to protect and collect the estate, alone justified the appointment of a Receiver by this Court, even though the application was made by the party appellant, *who, if the decision of the Ecclesiastical [*416] Court were correct, had no interest in the estate of the deceased. (*b*) It seems, also, from the report of *Blake* v. *Blake*, as cited in the above case, (*c*) that Sir W. Alexander, L. C. B., granted a Receiver pending an appeal to the delegates, even though the effect of the judgment of the Ecclesiastical Court was to confirm the probate, and the application was opposed by the executors to whom the probate had been granted. In *Liddell* v. *Liddell*, (*d*) it appears, that where time had been granted by the Spiritual Court to appeal, and before

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(*s*) 1 Williams on Exors. 389; Watkins v. Brent, 1 M. & C. 97.
(*t*) 3 Mad. 1; Jac. 466, S. C. (*u*) 2 M. & C. 454.
(*x*) 1 Williams on Exors. 390.
(*y*) Rolls, 9 Nov. 1838, cited 2 Beav. 293.
(*z*) 2 Beav. 289. (*a*) *Vide* ib. 298.
(*b*) His Lordship held also, that the circumstance of there being no person in whose name an action might be brought to recover the property, was not a sufficient objection to the appointment of a Receiver. 2 Beav. 289.
(*c*) Ibid. 293, n. (*d*) Cited 12 Ves. 465.

that time had expired or the appeal had been lodged, an application was made to this Court for a Receiver, the order was made, on the ground that the Spiritual Court, the time for appeal not being out, had refused to grant either probate or administration *pendente lite*.

Upon the principle that the Court will not appoint a Receiver where the party applying has an estate which he can assert at law, the Court will refuse to interfere against a joint tenant or tenant in common in possession, at the suit of another joint tenant or tenant in common, because the party complaining may at law relieve himself by the writ of partition. (*e*) It is upon this ground, that the Court has constantly refused to restrain a tenant in common from cutting timber, or doing any other act not amounting to destruction. (*f*) It appears, however, to have been considered that, in the case of an undivided estate, the Court would appoint a Receiver at the instance of any tenant in common or joint tenant, where, the defendant being in possession, receives the whole rent and excludes his companion from the share due to him; (*g*) but in *Tyson v. Fairclough*, (*h*) Sir J. Leach, V. C., expressed a doubt whether, even in the case of an actual exclusion of one tenant in common by another, this Court would appoint a Receiver. "If," his Honor observed, "it was an [*417] exclusion, *which amounted to an *ouster* at law, the party complaining must assert at law his legal title. If it were not such an exclusion, this Court would compel the tenant in common in receipt of the rents to account to his companion, but would not, I think, act against his legal title to possession." In corroboration of this, it may be stated, that in *Willoughby v. Willoughby*, which is mentioned by Mr. Dickens, in his note to *Calvert v. Adams*, (*k*) Lord Northington refused to appoint a Receiver of an undivided moiety, "putting this question: how could a Receiver let, set, or distrain, or take any steps without the consent of the other copartner?" But although the Court will not grant a Receiver at the instance of one party intitled at law to an undivided share of an estate, against another having a similar legal title, who may be in possession under such title, it will grant a Receiver of the applicant's share of the rents and profits; thus, where a motion was made, on the part of an infant owner of one undivided third of a plantation in the West Indies, for a manager and consignee of the whole estate, Lord Eldon refused to grant it, saying he never knew an instance of such an appointment, at the instance of one tenant in common against another; but that a Receiver might be appointed of the infant's share, who would receive his part of the clear proceeds from the person in possession. (*l*)

It is to be observed, that the rule which has been laid down that the Court will not, in the case of tenants in common or joint tenants, grant a Receiver against one at the instance of another, applies only where the plaintiff has a legal estate, the case is different where the party applying has only an equitable interest; there a Receiver will be appointed, because the party applying has no means of getting possession of his share; this rule was acted upon in *Street v. Anderton*, (*m*) where Lord Thurlow directed that the co-tenant should give security to account for one-third of the rents to the plaintiff, otherwise that the order should go for a Receiver.

[*418] The Court will also appoint a Receiver of a mine, where *it belongs to several parties who are working together, although the parties are tenants in common of it, (*n*) the Court, according to Lord Hard-

(*e*) Tyson v. Fairclough, 2 S. & S. 142—144.
(*f*) Ibid.
(*g*) *Vide* Milbank v. Revett, 2 Mer. 405.
(*h*) *Ubi supra.*
(*k*) 2 Dick. 479.
(*l*) Lowndes v. Baddington, MSS. 7 Feb. 1805.
(*m*) 4 Bro. C. C. 413.
(*n*) Jefferys v. Smith, 1 J. & W. 298.

wicke, considering property of this sort as in the nature of a trade; (*o*) "and where persons have different interests in it, it is to be regarded as a partnership; and the difficulty of knowing what is to be paid for wages and the expense of management, gives the Court a jurisdiction as to *mesne* profits which it would not assume with respect to other lands."

And here it may be noticed, that, in cases of partnership, the Court frequently appoints a Receiver of the partnership estate. In *Wilson* v. *Greenwood*, (*p*) Lord Eldon observed, "when a partnership expires, whether by the death of the parties or by effluxion of time, without special provision as to the disposition of the property, in all those cases, to which I may add the bankruptcy of a partner, the partnership is considered in one sense as determined, but in a sense also as continued, that is, continued till all the affairs are settled; and, as in the ordinary course of trade, if any of the parties seek to exclude the other from taking that part in the concern which he is entitled to take, the Court will grant a Receiver; so in the course of winding up the affairs after the determination of the partnership, the Court, if necessary, interferes on the same principle." From this it may be inferred, that a mere case of exclusion by one partner will afford a ground for the appointment of a Receiver, even where no dissolution of the partnership is contemplated; but the general rule appears to be, that the Court will not, upon motion, appoint a Receiver of partnership effects, unless it appears that the plaintiff will be entitled to a dissolution at the hearing, or unless the suit be so framed that a decree may be made, according to the intention of an instrument, which by the agreement of the parties is to regulate the mode of its being carried on; (*q*) thus in *Goodman* v. *Whitcombe*, (*r*) Lord Eldon lays it down, that if the Court *can see, that a dissolution of the partnership must take place, it follows very much of course that a Receiver must be appointed; but if the case made stands in such a state, that the Court cannot see whether it will be dissolved or not, it will not take into its own hands the conduct of a partnership which only *may* be dissolved. It may be a question, whether the Court will not restrain a partner, if he has acted improperly, from doing certain acts in future; but, if, what he has done does not give the other party a right to have a dissolution of the partnership, what right has the Court to appoint a Receiver and make itself the manager of every trade in the kingdom? (*s*)

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It is, however, to be observed, that there are cases in which Lord Eldon himself has held, that, even where no dissolution is sought, the Court will grant a Receiver. These are where suits have been instituted to compel partners to act according to the provisions of instruments into which they have entered; in such cases, the Court will take care that the decree shall not be defeated by anything to be done in the meantime, and will appoint a Receiver to protect the property. (*t*) Thus where, in 1812, the then proprietors of Covent Garden Theatre executed a deed by which they covenanted and agreed that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits; and, in 1822, parties who had become entitled under

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(*o*) *Vide* Story v. Lord Windsor, 2 Atk. 620, and cases there cited; Jesus College v. Bloom, Amb. 56; Sayer v. Pierce, 1 Ves. 232, and Belt's Supp. 127, S. C., Crawshay v. Maule, 1 Swanst. 518.

(*p*) 1 Swanst. 471, 480.

(*q*) Court v. Harris, T. & R. 496, 517.

(*r*) 1 J. & W. 589, 592.

(*s*) *Vide etiam*, Oliver v. Hamilton, 2 Anst. 453; as to question whether bills can be sustained for partnership accounts, without seeking a dissolution of partnership. *Vide ante*, vol. 1, p. 435.

(*t*) Const v. Harris, T. & R. 496.

the former proprietors to seven-eighths of the theatre, entered into an agreement which provided in some respects for a different application of the profits, and otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject, the Court, upon a bill filed by that party for the specific performance of the covenants and agreements contained in the deed of 1812, appointed a Receiver.

The rules with regard to the appointment of a Receiver in the case of part-
[*420] nerships, are very clearly laid down in Mr. Collyer's *valuable treatise on the Law of Partnership (*u*)—"where a dissolution is intended, or has already taken place, a Court of Equity will appoint a Receiver, provided there be some breach of the duty of a partner, or of the *contract* of partnership." (*x*) Thus if, in breach of moral obligation, one partner unjustly takes possession, and refuses to give security to his copartner for his share of the stock, moneys, and securities; (*y*) or if he in any respect behaves *unrighteously* against the interest of the other partner, a Receiver will be appointed. (*z*) So, also, if in breach of the contract of partnership, he carries on the trade with the partnership effects on his separate account, after the dissolution, (*a*) and thus or in any other manner excludes his copartner from that share to which he is entitled in winding up the concern, a Receiver will be appointed. (*b*)

*The same rules which prevail respecting the appointment of a
[*421] Receiver in a suit between partners, are applicable in a suit between the representative of a deceased partner and the surviving partner. However, in the case of *Hartz* v. *Schrader*, (*c*) where the bill was filed, by the administrator of a deceased partner against the surviving partner, and a motion was made to restrain the defendant from disposing of the joint stock, and receiving the outstanding debts, and for a Receiver, and the affidavits stated, according to the *information and belief* of the deponant "that the defendant is in embarrassed circumstances and at present imprisoned in Newgate for a separate debt,

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(*u*) Collyer on Partnership, p. 196.

(*x*) Harding v. Glover, 18 Ves. 281; Estwick v. Conningsby, 1 Vern. 118. In Skip v. Harwood, a Receiver was appointed of the brewery—"It was ordered that it should be referred to the Master to appoint a proper person to be a Receiver of the stock, goods, &c., of the brewing trade, and the debts due to the partnership; that the defendant be restrained from receiving any debts due or to become due in the said trade; that the Master do allow the Receiver a reasonable salary for his care, he giving security, &c.; that such Receiver do act as broad clerk in the said brewing trade, and collect and get in the debts according to the custom and usage of the trade; and out of the money to be received on account of the said debts, &c., that the said Receiver do pay the excise, and the charges, &c., in the said brewing trade; that the said Receiver be at liberty to bring actions for such debts as are now or shall become due, as occasion shall require; and the persons in whose names such action shall be brought, are to be indemnified against any costs and damages on account thereof, out of the stock, goods, and effects, in the said trade. The stock, goods, and money in the hands of the Receiver, to be applied as the Court shall direct. The books relating to the trade to be in his custody. In the meantime, the defendants to be restrained from alienating, disposing, or removing, any of the utensils or dead stock belonging to the said trade." R. L. 1748. B. 517.

(*y*) Peacock v. Peacock, 16 Ves. 49; Milbank v. Revett, 2 Mer. 405.

(*z*) If partners quarrel, and one of them behaves unrighteously against the interest of the other, a Receiver will be appointed, but if partners quarrel, a Receiver will not merely on that account be appointed. P. Lord Eldon, Texeire v. Da Costa, in Chancery, Nov. 1815, Cooke's MSS.

(*a*) Harding v. Glover, *ubi supra*.

(*b*) The dissolution which takes place, on the refusal of an appointee under a will to become a partner, is clearly not a dissolution arising from the exclusion of the appointee by the surviving partners, and will therefore be no foundation for a Receiver. Kershaw v. Matthews, 2 Russ. 62.

(*c*) 8 Ves. 317; 2 Hov. Supp. 106, S. C.

and now expends the joint stock, or the moneys received by him for the outstanding debts, in the maintenance of himself and his family, and not in discharge of the debts due from the partnership," Lord Eldon made the order for an injunction, but refused it as to a Receiver.

Where all the partners are dead, and a suit is instituted between their representatives, a Receiver will be appointed as a matter of course; "for," as Lord Kenyon observed, "where there is a copartnership there is a confidence between the parties; and if one dies, the confidence in the other partner remains, and he shall receive; but where both are dead, there is no confidence between the representatives, and therefore the Court will appoint a Receiver." (*d*)

The Court will also appoint a Receiver pending an investigation into the title to an estate, in a suit for the specific performance of an agreement, and this it will do at the suggestion of the vendor, reserving, however, the consideration of the question at whose expense it should be; (*e*) in *Boehm* v. *Wood*, (*f*) where an appointment of this nature had been made, and the purchaser was afterwards compelled to take the title, Lord Eldon held it to be clear that the Receiver was to be considered as his Receiver.

In *Hall* v. *Jenkinson*, (*g*) which was also a case of specific [*422] *performance, the Court, at the instance of the plaintiffs, granted a Receiver after the answer of the purchaser, who was in possession, upon his admission of insolvency and intention to sell and convey.

A Receiver may likewise be appointed of the rents and profits of an infant's estate, provided there be a bill filed; (*h*) but the Court will not appoint a Receiver, in such case, on petition merely. It seems, however, that, in the case of idiots, or lunatics, a Receiver has been appointed, upon petition, where no person could be found disposed to act as committee. (*i*)

Having considered the circumstances under which the Court will appoint a Receiver, it is convenient in this place to call the reader's attention to the nature of the property which the Court will take under its protection by means of such appointment.

It may be collected from what has been already laid down, that a Receiver may be appointed of the rents and profits of lands, houses, &c., and also of all personal estate which is capable of being reduced into possession. In *Davis* v. *the Duke of Marlborough*, (*k*) it was held that, in favour of equitable creditors, the Court will appoint a Receiver of all property against which a legal creditor might obtain execution; upon this ground a Receiver has been appointed of the profits of a rectory, (*l*) under an *elegit*. The appointment is not, however, confined to such property as is liable to be taken under an execution at law, but has been extended to whatever is considered in equity as assets; and, therefore, in *Blanchard* v. *Cawthorne*, (*m*) a Receiver was appointed at the instance of a judgment creditor of the office of master forester of a royal forest.

So, also, in *Palmer* v. *Vaughan*, (*n*) the profits of the office of Clerk of the Peace for a county, having been assigned for *the payment of [*423] creditors, a Receiver was appointed pending the discussion of a

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(*d*) Philips v. Atkinson, 2 Bro. C. C. 272. (*e*) Boehm v. Wood, 2 J. & W. 236.
(*f*) T. & R. 332, S. C. (*g*) 2 V. & B. 125.
(*h*) Anon. 1 Atk. 489, 578; *ex parte* Whitfield 2 Atk. 315.
(*i*) *Ex parte* Warren, 10 Ves. 622; and *vide* Anon. 1 Atk. 578.
(*k*) 2 Swanst. 132.
(*l*) Silver v. Bishop of Norwich, 3 Swanst. 112; White v. Bishop of Peterborough, ib. 109.
(*m*) 4 Sim. 566. (*n*) 3 Swanst. 173.

question as to the validity of the assignment; but in *Cooper* v. *Reilly*, (*o*) a Receiver was refused, pending such a discussion, of the salary of Assistant Parliamentary Counsel to the Treasury, on the ground that the salary of such an office was not assignable, upon grounds of public policy.

It has already been shewn, that a pension granted by the crown is capable of being taken under a sequestration for want of an answer, (*p*) it may therefore be assumed, that such a pension may be the subject of a Receiver; the rule, however, will not extend to the half pay of an officer in the army or navy, which, as we have also seen, is, upon grounds of public policy, exempt from the operation of a sequestration. (*q*) So, also, it has been held, that a pension granted by the 4 & 5 Ann, c. 4, for the more honorable support of the dignities of the Duke of Marlborough, to the persons, severally and successively, to whom the same should come by virtue of that act, with a proviso that the acquittance of every such person should be a sufficient discharge, was, upon grounds of public policy, inalienable, and therefore not the subject of a Receiver, although the *estates* (which by the 5 Ann, c. 3, were limited to the Duke for life with remainder) in tail male, &c., in such manner that they might always go along and be enjoyed with the titles and dignities, with a proviso that they should not be aliened to the injury of the persons in remainder, were held to be alienable during the life of the person in possession, and to be therefore, the subject of a Receiver during his life. (*r*) A Receiver will also be appointed of heir looms (*rr*) or of turnpike tolls, (*s*) but the Court will not appoint a Receiver of parochial rates which are to be assessed and collected at a future period. (*t*)

It is not necessary in order to authorize the Court to make an order for a Receiver that the property in respect of which he is to be appointed should be [*424] in England; a Receiver will *be appointed, here, of property in the East Indies (*u*) in which case the Receiver must find sureties who are resident in England. A Receiver may also be appointed of estates in Ireland, but it seems that, in such cases, the recognizances of the Receiver and his sureties may be entered into and inrolled in that country. (*x*)

It may also be mentioned, that officers in the nature of Receivers are frequently appointed of plantations in the West Indies, but as a plantation in the West Indies partakes, in some measure, of the nature of a manufactory or trade, instead of a Receiver the person appointed is usually called a manager. (*y*)

(*o*) 2 Sim. 560; 1 R. & M. 560, S. C. (*p*) *Ante*, vol. 1, p. 638.
(*q*) Ibid.
(*r*) Davis v. Duke of Marlborough, 1 Swans. 74; 2 Swans. 125.
(*rr*) Shaftesbury v. Duke of Marlborough, Seaton on Dec. 330.
(*s*) Knapp v. Williams, 4 Ves. 430; Dumville v. Ashbrooke, 3 Russ. 98, n.
(*t*) Drewry v. Barnes, 3 Russ. 94.
(*u*) Cockburn v. Raphael, 2 S. & S. 453; in ——— v. Lindsey, 15. Ves 91, Lord Eldon appointed a Receiver resident in England with liberty to appoint his own agent in India; *vide* Equity Draftsman, Vol. 2, 348.
(*x*) *Vide* stat. 43 Geo. 3, c. 90, and *ante*, Vol. 1, p. 282. The order directs the recognizances of the Receiver and his sureties to be acknowledged before a Master of the Court of Chancery in Ireland, and to be entered and inrolled there, and the entering and inrolling to be duly certified to the Court by Master of the Court of Chancery in Ireland.
(*y*) *Vide post*, Sect. VIII.

SECTION II.

Who may be a Receiver.

GENERALLY speaking, a Receiver should be a person wholly disinterested in the subject matter of the suit, but in some cases, although he may be mixed up with the suit, a person so situated may be appointed. (*a*) Thus in a suit to establish a will, the heir-at-law has been appointed Receiver till after the trial of an issue. So also it has been held, that a trustee may, under circumstances, be a Receiver, (*b*) provided he will accept the appointment without emolument. (*c*) But in no case can a trustee, or other party to a cause, be a Receiver *with emolument*, unless no one else can be procured who will act with the same benefit to the estate; (*cc*) and it is to be observed *that, even where he is disposed to act without emolument, the Court will not [*425] appoint a trustee to be a Receiver, where he is the person to watch and check the Receiver for the benefit of the parties interested. (*d*)

The rule that the Court will not sanction the appointment, as Receiver, of a person whose duty it is to check and control the individual appointed, is extended to other persons besides trustees; thus it has been held, that a Master in Chancery cannot be appointed committee of a lunatic's estate, because it may become his duty to pass the accounts in the lunacy; and it may therefore be affirmed that the Court would, upon similar grounds, refuse to appoint a Master in Chancery to be a Receiver. (*e*) Upon the same principle it has been held, that, as it is the duty of the next friend of an infant to watch the accounts and conduct of a Receiver of the infant's estate, the two characters are incompatible with each other; (*f*) and, in *Taylor* v. *Oldham*, (*g*) Lord Eldon held that the son of a next friend ought not to be a Receiver.

Upon similar grounds it has been held, that a solicitor in the cause cannot be appointed as Receiver, because it is his duty to control the Receiver's accounts. (*h*) It is no objection however, to a person proposed, that he is a practising barrister; (*i*) and although, in *Wynne* v. *Lord Newborough*, (*k*) Lord Eldon appears to have considered that the circumstance of the gentleman who was appointed being a barrister practising at a distance from the estate, was one which deserved consideration, yet many instances have since occurred in which barristers practising in London have been appointed Receivers of estates at a distance. (*l*)

*In *Wynne* v. *Lord Newborough*, (*m*) before referred to, the [*426] Receiver appointed by the Master, besides being a barrister, was

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(*a*) Fingal v. Blake, 2 Moll. 50. (*b*) Sykes v. Hastings, 11 Ves. 363.

(*c*) A party to the suit cannot be appointed by a Master unless the order of reference contains an express authority to that effect. *Vide post*, 430.

(*cc*) Fingal v. Blake, 2 Moll. 50; Sykes v. Hastings, 11 Ves. 364; ——— v. Jolland, 8 Ves. 72; Anon. 3 Ves. 515.

(*d*) Sutton v. Jones, 15 Ves. 588. (*e*) *Ex parte* Fletcher, 6 Ves. 427.

(*f*) Stone v. Wishart, 2 Mad. 64. (*g*) Jac. 527, 529.

(*h*) Garland v. Garland, 2 Ves. J. 137; in Bagot v. Bagot, Sir L. Shadwell, V. C. on the application of a married woman for a Receiver of her separate estate, appointed her solicitor to that office, on her nomination in Court, without a reference to the Master, although a strong affidavit was made by the husband shewing the unfitness of the solicitor for the office. The party appointed undertook to act as Receiver without salary. 2 Jurist, 1063.

(*i*) Garland v. Garland, *ubi supra*. (*k*) 15 Ves. 283.

(*l*) In Townshend v. Townshend, a practising barrister resident in London was appointed Receiver of estates in Norfolk. (*m*) 15 Ves. 283.

also a member of the Commons House of Parliament; and Lord Eldon, although he did not consider that circumstance as affording any positive ground of objection to his appointment, held that it was one which deserved great consideration; and, in *Attorney General* v. *Gee*, (*n*) he determined that a Peer could not be a Receiver, because, "in many instances a Receiver may be committed,"—a reason which equally applies to a member of the House of Commons as to a Peer.

It seems, also, that the Receiver General of taxes for a county cannot be appointed a Receiver; for, having given, as such, security to the crown, if he were to become indebted to the crown and to the estate, the crown might, by its prerogative process, sweep away all his property. (*o*) Upon the same ground it might be held, that any person who is in the situation of an accountant to the crown would be objectionable.

SECTION III.

Appointment of Receivers.

THE Court has no jurisdiction to appoint a Receiver, unless a cause is pending; (*a*) therefore, a Receiver cannot be appointed of an infant's estate, upon petition "in the matter of the infant." (*b*) The only exception to the rule appears to be in the case of lunatics, in which the Lord Chancellor will appoint a Receiver of the estates, upon petition, in the lunacy, (*c*) as, in *ex parte Radcliffe*, (*d*) where a Receiver was appointed of a lunatic's estate, with a salary, because no one could be found who would undertake the office of committee without a salary.

[*427] *When it is intended to apply to the Court, before decree, for the appointment of a Receiver, it is usual to insert in the prayer of the bill, a request that the Court will, if necessary, appoint one; this, however, is not absolutely requisite, and if the *facts* of the case authorize it, the Court will appoint a Receiver, although there is no prayer to that effect in the bill; (*e*) indeed the necessity for the appointment frequently occurs after the bill has been filed, so that it could not have been part of the prayer, and the Court will, nevertheless, make the order, without requiring the bill to be amended.

An application for a Receiver may be by petition, but it is usually made by motion of which notice must be given; a Receiver may also be appointed by decree. (*f*)

Strictly speaking, a Receiver can only be appointed after answer, and it seems formerly to have been held, that a Receiver could not be granted before, but the rule was broken through by Lord Kenyon in *Vann* v. *Barnett*, (*g*) and

(*n*) 2 V. & B. 208.
(*a*) Anon. 1 Atk. 578.
(*c*) Anon. 1 Atk. 578.
(*d*) 1 J. & W. 639; and *vide ex parte* Warren, 10 Ves. 622.
(*e*) Malcolm v. Montgomery, 2 Mol. 500. (*f*) *Vide* Seton on Dec. 316.
(*g*) 2 Bro C. C. 158; but Lord Thurlow had several years previously appointed a Receiver of an infant's estate upon the filing of the bill, and before a *subpœna* to appear and answer had been served, *vide* Pitcher v. Helliar, 2 Dick. 580; and Lord Bathurst had, in a still earlier case, granted a motion for a Receiver before answer. Compton v. Bearcroft, 2 Bro. C. C. 158, n.
(*o*) Attorney General v. Day, 2 Mad. 254.
(*b*) *Ex parte* Whitfield, 2 Atk. 315.

the order then made for a Receiver before answer, has been followed since, wherever justice has required it, and the merits have appeared by affidavit. (*h*)

In *Metcalfe* v. *Pulvertoft*, (*i*) Lord Eldon says, "With respect to appointing a Receiver before answer, I take it that the cases where the Court has refused it turned upon this,—that the party applying for the appointment could not state that he had, strictly speaking, an equitable title." But even where that is the case, yet if the defendant answers the plaintiff's affidavit and admits his case, a Receiver will be appointed. (*k*)

But the Court will not only appoint a Receiver before answer, [*428] *it will, in cases of urgency, entertain the application before appearance; (*l*) it is to be observed, however, that the general rule of the Court is, that a motion for a Receiver cannot be made, as for an injunction it may be, without notice; (*m*) if, therefore, a Receiver is to be applied for, before appearance, notice of the motion must be served upon the defendant personally, to authorize which, it is to be recollected, there must be a previous application to the Court for leave to make such service; (*n*) the fact of which having been obtained must be mentioned in the notice of motion. The rule, however, which requires previous notice to be served upon a defendant who has not appeared, is subject to exception where the defendant is resident out of the jurisdiction of the Court, and cannot be served. (*o*)

The Court will also appoint a Receiver after an interlocutory decree, and this it will do upon motion, notwithstanding a reservation of all matters under the decree; because such an appointment is a mere provisional proceeding, and does not affect the question between the parties; (*p*) and it was held, by Sir Anthony Hart, L. C. (in Ireland,) that, after a hearing and a rehearing had taken place, and although the Court had refused a Receiver, the party was intitled to have one, on further directions, as he shewed, by the report, an altered state of facts, (such as a balance in the hands of the defendant,) which entitled him to say that now a Receiver should be granted. (*q*)

Where the application for a Receiver is made before answer, it must be supported by affidavits verifying the facts which are relied upon by the party making it; after answer, the plaintiff can only rely upon the admissions in the answer; but where a notice of a motion for a Receiver was given on the 30th of May, for the 2nd of June, in support of which the plaintiff filed an affidavit, and the answer was put in on the 2nd of June, on which day the motion was to have been made, but the motion *was postponed,—upon the [*429] plaintiff's making the application; at a subsequent time, it was objected, on the part of the defendant, that the plaintiff was not intitled to read the affidavit, but Lord Eldon said that the practice in such cases was, to allow the affidavit to be read and to look upon the answer as a counter-affidavit. (*r*)

And so where one defendant, only, of two material defendants had answered,

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(*h*) Duckworth v. Trafford; 18 Ves. 283, and *vide* Jervis v. White, 6 Ves. 738; Middleton v. Dodswell, 13 Ves. 266, 269; Hugonin v. Baseley, ibid. 105–7–8; Metcalfe v. Pulvertoft, 1 V. & B. 180; Davis v. Duke of Marlborough, 2 Swanst. 138; Tanfield v. Irvine, 2 Russ. 149.

(*i*) *Ubi supra.*

(*k*) *Vide* Vann v. Barnett, *ubi supra*, where the Receiver would not have been appointed, but for the defendant's affidavits; *vide etiam*, Jervis v. White, *ubi supra.*

(*l*) Tanfield v. Irvine, 2 Russ. 149; *ante*, p. 346.

(*m*) *Per* Leach, Arg. 1 V. & B. 183.

(*n*) Hill v. Rimell, 2 M. & C. 641. *Ante*, p. 259.

(*o*) *Vide ante*, p. 403.

(*p*) Cooke v. Gwyn, 3 Atk. 690.

(*q*) Attorney General v. Mayor of Galway, 1 Moll. 95—104.

(*r*) Goodman v. Whitcomb, 1 J. & W. 589; *vide* Glassington v. Thwaites, 1 S. & S. 134.

the plaintiff was permitted to read his affidavit in support of the application, and the answer of the defendant which had come in was treated as an affidavit (*s*)

The order, when made, usually refers it to the Master to appoint a proper person to be the Receiver, either of the rents and profits of the estate, &c., mentioned in the pleadings, or of the outstanding personal estate and effects of the testator, or of the partnership firm in the pleadings mentioned, (as the case may be,) and to allow him a proper salary for his care and pains therein; the person so to be appointed first giving security to be approved of by the said Master, (and to be taken before a Master extraordinary in the country if there should be occasion,) duly and annually to account for and pay what he shall so receive, as thereinafter is directed, or as the Court shall direct.

But although it is usual to include in the order a direction that the Receiver shall give securities, yet it sometimes happens, that where the parties in the cause name the Receiver, the Court will appoint him upon his own recognizance only; (*t*) and where the appointment of a person to be Receiver, was made by the testator and confirmed by the Court, the personal recognizance of such Receiver was held sufficient. (*u*)

If the Receiver is of rents and profits of real estates, the order directs that the tenants of such estates shall attorn and pay their rents in arrear and growing rents to such Receiver, who is to be at liberty to let and set the estates, from time to time, and to manage the same, (*x*) with the approbation of the Master as there shall be occasion. (*y*)

[*430] *If the Receiver be of outstanding personal estate or of partnership property, the order generally goes on to direct the executors, or other parties, to deliver over to the person to be appointed Receiver all securities in their hands for such outstanding debts and effects, together with all books and papers relating thereto; and that, in case there shall be any occasion to put any of the debts in suit for the recovery thereof, the same shall be done with the approbation of the Master; and such person, so to be appointed, is to make use of the name or names of the executors or other parties for that purpose who are to be indemnified out of the estate and effects. (*z*)

In either case, the order directs, that the person to be appointed Receiver shall, from time to time, annually pass his accounts, before the Master, (*a*) and pay the balance that shall be reported due from him, into the bank, with the privity of the Accountant General of the Court, to be there placed to the credit of the cause in which the order is made, subject to the further order of the Court. (*b*)

If the Receiver is appointed on behalf of a mortgagor or other incumbrancer, the order generally contains a direction that the appointment of the Receiver is not to affect the prior incumbrancers upon the estate who may think proper to take possession of the estates and premises, by virtue of their securities respectively; (*c*) and it usually directs the Master to inquire what incumbrances there are affecting the estate, and into the priorities thereof respectively; and orders that the person to be appointed Receiver do, out of the rents and profits to be received by him, keep down the interest and payments in respect of such incumbrances according to their priorities, and do also pay the balance, &c., into the bank, &c. (*d*)

(*s*) Kershaw v. Mathews, 1 Russ. 361; *vide ante*, p. 261.
(*t*) Countess of Carlisle v. Lord Berkley, Amb. 599; Ridout v. El. Plymouth, 1 Dick. 68.
(*u*) Hibbert v. Hibbert, 3 Mer. 681.
(*x*) *Vide* Ord. 1828, LXIV.
(*y*) Seton on Dec. 316.
(*z*) Seton on Dec. 323.
(*a*) Ibid.
(*b*) Ibid. 346.
(*c*) Ibid. 322.
(*d*) *Vide ante*, p. 402.

Where a party to the cause is to be proposed as a Receiver, the order must contain a direction that the party intended to be proposed or any of the parties, shall be at liberty to propose himself. (*e*)

*Where the estates lie very remote from each other, or are very large, the Court will direct the appointment of more than one Receiver; the Master, however, has no power, under a direction to appoint a Receiver, to appoint more than one—there must be a special direction to that effect. [*431]

The order having been passed and entered, is to be carried in to the Master's Office, and proceeded upon nearly in the same manner as orders for the appointment of new trustees. (*ee*)

The state of facts and proposal of the person to be Receiver, is generally carried in by the party obtaining the order of reference, but any other party may carry in a proposal. It is to be recollected, however, that a party to the record cannot propose himself as Receiver without the leave of the Court. (*f*)

A stranger cannot propose a person to be a Receiver, (*g*) and it seems doubtful whether, if all the parties neglect to propose a Receiver, the Master can propose one himself; and in *Attorney General* v. *Day*, (*h*) where, upon the neglect of the parties, the Master had, himself, proposed a Receiver, the Court, although it did not actually express its disapprobation of the proceeding, thought it right, under the circumstances, to direct the Master to review his report.

A state of facts and proposal for the appointment of a Receiver usually sets out the particulars of the property over which the Receiver is to have authority, and if it consist of lands or houses, or other property of that nature, the yearly rental, &c., and it ends by proposing the person intended to be appointed, with his description, and the names of the persons to be proposed as securities. (*i*) This must be supported by an affidavit stating the yearly or other value of the property. (*k*) There must also be an affidavit of the sufficiency of the sureties, *each of whom must swear that they are worth double the amount of the property, or yearly rent of the property, in question; (*l*) this, however, is not necessary to be brought in till the Master has determined who is to be Receiver. [*432]

The usual warrants, "*on leaving*," and "*to proceed*," having been obtained and served, (*m*) the Master, upon the day named in the warrant, proceeds to make the appointment, and if there is a proposal and counter-proposal, he decides between them and allows the proposal of that party who in his judgment has proposed the most fitting person. It has sometimes happened, when the appointment has been contested, and the order has authorized the Master to appoint more than one Receiver, that he has, by consent, allowed the proposal of each, and appointed two Receivers. (*n*)

It is to be noticed, that the order referring it to the Master to appoint a Receiver, directs that the Master shall *appoint*, and not that he shall *approve*,

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(*e*) *Vide ante*, p. 424, n.; but a party to the record cannot be a Receiver unless he consents to act without salary. Ibid.

(*ee*) *Ante*, vol. 2, p. 893.

(*f*) *Supra*.

(*g*) Attorney General v. Day, 2 Mad. 257. In Lord Macclesfield's case, one of the articles of impeachment was, for removing a Receiver of an infant's estate appointed by his guardian and approved by the Master, and appointing another himself, who became insolvent with moneys in his hands; his Lordship, however, explained the transaction satisfactorily, and the managers dropped the charge. Ibid. 258.

(*h*) *Ubi supra*.

(*i*) Bennett, 94.

(*k*) Ibid.

(*l*) Bennett, 94.

(*m*) *Ante*, vol. 2, p. 798.

(*n*) 1 Turn. & V. 455, 6.

as in the case of a guardian; the Master, therefore, proceeds at once to make the appointment, without any intermediate report to the Court. (*o*)

It may be mentioned here, that the order directs the Master to appoint a Receiver, &c., "*he first giving security to be approved of by the Master.*" The course of the Court, under this order, requires the security to be given by the Receiver, and sureties in a recognizance; and that where, instead of following this course, the Master had taken an assignment of a mortgage belonging to a Receiver, Lord Hardwicke considered that he acted very improperly. (*p*)

When the Master has decided upon the proposal, the draft of the recognizance to be entered into by the Receiver and his sureties, and of an affidavit of the sufficiency of the sureties, will be prepared in the Master's Office. A warrant must then be taken out by the solicitor on "preparing the recognizance and affidavit," and served on the adverse Clerks in Court, and copies may then [*433] be taken by the Receiver and the other parties interested *in the appointment. The recognizance is then engrossed upon the proper stamp, and the affidavit having been also engrossed, the Master signs his allowance in the margin of each; and a certificate of the Master's approval of the Receiver, and of his having settled and allowed the recognizance and affidavit is prepared, and warrants *on preparing, to settle, and to sign* are severally taken out and served. Copies of the certificate must be taken by the Receiver and by the solicitors for the parties interested, and the certificate is afterwards transcribed and signed by the Master, and usually remains in the Master's Office until the report appointing the Receiver is signed. (*q*)

The next proceeding is to take out a warrant for the Receiver and his sureties, to enter into the recognizance; and for the sureties to swear the affidavit of sufficiency; for this purpose, the Receiver and his sureties must personally attend and enter into the recognizance before the Master, and the sureties must justify, by affidavit of their sufficiency. (If they are in the country, however, the recognizance, &c. may be taken before a Master extraordinary.) The recognizance is then carried by the Master's Clerk to the Inrolment Office in Chancery, and inrolled there, (*r*) and a receipt taken: the affidavit remains in the Master's Office. A draft report of the appointment of the Receiver must then be prepared, and copies taken by the Receiver and all parties interested, and warrants on *preparing the report and to settle and sign* taken out, served, and attended; the report is then transcribed and signed by the Master, which, together with the report of approval, must be filed at the Report Office, and office copies taken by the Receiver and all parties interested in the appointment. The report however, requires no confirmation. (*s*)

[*434] *The costs of the appointment and incidental proceedings must, in the first instance, be paid by the Receiver, who, in passing his first account, will be allowed such costs, upon his bringing in a bill of them to be taxed. (*ss*)

(*o*) Bowersbank v. Cassidaer, 3 Ves. 165. (*p*) Mead v. Ld. Orrery, 3 Atk. 237.
(*q*) 1 T. & V. 456.
(*r*) It seems that, according to the practice of the Petty Bag Office, all recognizances must be inrolled within six months; *vide* Bothomley v. Fairfax; 1 P. Wms. 340; but leave will be given to inrol them *nunc pro tunc*; Vaughan v. Vaughan, 1 Dick. 90; as to whether such inrolment will prejudice subsequent incumbrancers, *vide* Bothomley v. Fairfax, *ubi supra*; and Fothergill v. Kendrick, 2 Vern. 234.
(*s*) *Ante*, vol. 2, p. 944. (*ss*) 1 T. & V. 457.

It seems that the proper way to bring the propriety of the Master's appointment of a Receiver before the Court, is by excepting to his report; (*t*) it may, however, be done by petition. (*u*)

The judgment of the Master, however, in the selection of a Receiver, is never disturbed by the Court, unless it is shewn that the person appointed is improper; (*x*) and it then requires a strong case to induce the Court to interfere with the Master's judgment; (*y*) and it will not, in such a discussion, enter into comparisons as to the eligibility of the different individuals proposed. (*z*)

But although the Court is reluctant to suppose the Master wrong in the appointment which he has made, yet it will, where a strong case is made of objection to the individual appointed, refer it back to the Master to review his report. (*a*)

A Receiver appointed by this Court is appointed on behalf of all parties, and not of the plaintiff or of one defendant only; (*b*) therefore, if any loss arises from deficiency in his accounts, the estate must bear it. (*c*) The effect of the appointment, *however, is not to oust any party of his right to the possession of the property, but merely to retain it for [*435] the benefit of the party who may ultimately appear to be entitled to it; (*d*) and when the party entitled to the estate has been ascertained, the Receiver will be considered as his Receiver. (*e*) It is to be observed, however, that where, in consequence of the inability of the vendor, of an estate sold under a decree, to make out his title, a Receiver had been appointed, the Court thought that the expenses of the Receiver ought not to be borne by the purchaser, and directed that they should be repaid to him out of the fund in Court, together with the costs of the application. (*f*)

It has been already stated, (*g*) that where sequestrators, upon *mesne* process, are in possession of the lands or tenements in question in the cause, the appointment of a Receiver of the rents and profits will have the effect of discharging the sequestration. (*h*)

When a Receiver has been appointed of lands or tenements, it is the duty of any party to the record to deliver up to him the possession of such of the lands or tenements as may happen to be in such party's possession. If, however, the party should refuse to do so, the proper course to compel him is to obtain an order, upon motion, that he may deliver up the possession to the Receiver; (*i*)

(*t*) Creuze v. Bishop of London, 2 Dick, 687; 2 Bro. C. C. 253, S. C.; Tharpe v. Tharpe, 12 Ves. 317.

(*u*) Wynne v. Lord Newborough, 15 Ves. 283.

(*x*) Garland v. Garland, 2 Ves. J. 137; Anon. 3 Ves. 515; Thomas v. Dawkins, 3 Bro. C. C. 508; 1 Ves. J. 452 S. C.; Creuze v. Bishop of London, 2 Bro. C. C. 253; 2 Dick. 687, S. C.; Wilkins v. Williams, 3 Ves. 588.

(*y*) Bowersbank v Cassidaer, 3 Ves. 164. (*z*) Ibid.; Tharpe v. Tharpe, 12 Ves. 317.

(*a*) Creuze v. Bishop of London, 2 Bro. C. C. 253; Wynne v. Lord Newborough, 15 Ves. 284; *et vide* Atty. Gen. v. Day, 2 Mad. 246, and the cases there cited.

(*b*) Davis v. The Duke of Marlborough, 2 Swanst. 118. This must not be understood of Receivers appointed of the estate of an infant during his minority.

(*c*) Lord Hutchinson v. Lord Massareene, 2 B. & B. 55.

(*d*) Sharp v. Carter, 3 P. W. 379. (*e*) Boehm v. Wood, T. & R. 345.

(*f*) M'Leod v. Phelps, Jan. 1838, 962. (*g*) *Ante*, vol. 1, p. 650.

(*h*) Heyn v. Heyn, Jac. 49; Shaw v. Wright, 3 Ves. 22.

(*i*) Griffith v. Griffith, 2 Ves. 401.

and if upon service of such order (*k*) he refuses to deliver up the possession, the plaintiff may sue out a writ of assistance in the manner pointed out in the 1 W. 4, c. 36, s. 15, rule 19. (*l*) It is to be observed, that the person to enforce the delivery of the possession to the Receiver, is the party obtaining the order, and not the Receiver himself.

[*436] *Where the lands or tenements, or any of them, are not in the actual occupation of the party, the order for the appointment of a Receiver usually contains a direction that the tenants shall attorn to the Receiver, and shall pay their rents in arrear, as well as the growing rents, to such Receiver. (*m*) Under this order, application should be made by the Receiver to the tenants to attorn, and if they, or any of them refuse to do so, the party obtaining the Receiver should serve them, or such of them as refuse to attorn, with a copy of the order for the appointment of the Receiver, and of the Master's report of having appointed him. He should also serve them with a notice of motion that they may be ordered to attorn within four days, or stand committed. (*n*) Upon this motion, the parties in possession may appear, and inform the Court whether they are in possession as tenants or not; (*o*) but if they do not appear, the order will be made, and must be served personally upon the tenants; and upon affidavit of service and non-compliance, the party prosecuting the contempt may obtain an order, as of course, for their committal to the Fleet, which is drawn up by the Deputy Warden of the Fleet, and having been signed by the Lord Chancellor, is executed in the ordinary way. (*p*)

In *Reid* v. *Middleton*, (*q*) which has been before referred to, it appeared that the tenant in possession had not agreed to pay any specific rent, and in consequence, an order was made that an occupation-rent should be settled by the Master, and that the tenant should pay the arrears and future payments of such occupation-rent.

When a Receiver has been appointed, his possession is that of the Court, and any attempt to disturb it without leave of the Court first obtained, will be a contempt on the part of the person making it. It was so settled in *Angel* v. *Smith*, (*r*) *where the rule was laid down, both with respect to Receivers and sequestrators, that their possession is not to be disturbed without leave. When, therefore, a party is prejudiced by having a Receiver put in his way, the course has either been, to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*. (*s*)

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The rule that the possession of a Receiver is not to be disturbed, extends even to cases in which he has been appointed expressly *without prejudice* to the rights of persons having prior estates; (*t*) and the individuals having such prior estates must, if they wish to avail themselves of them, apply to the Court either for liberty to bring an ejectment, or to be examined *pro interesse suo*; (*u*)

(*k*) In Davis v. Duke of Marlborough, 2 Swanst. 116, the order appointing the Receiver directed the Duke of Marlborough to deliver up possession to the Receiver.

(*l*) *Ante*, vol. 2, p. 724. This appears to have been the ancient practice of the Court in the case of Receivers; *vide ante*, vol. 1, p 643.

(*m*) *Ante*, p. 429, and *vide* Simmonds v. Lord Kinnaird, 4 Ves. 747.

(*n*) 1 Smith, 637; Reid v. Middleton, T. & R. 455.

(*o*) Ibid.

(*p*) 1 Smith, 637; Broad v. Wilkinson, 9th June, 1831; R. L. for 1643.

(*q*) *Ubi supra*.

(*r*) 9 Ves. 335.

(*s*) Brooks v. Greathed, 1 J. & W. 176.

(*t*) *Vide ante*, p. 401.

(*u*) *Vide* Bryan v. Cormick, 1 Cox, 422.

and this although their right to take possession is clear. (*x*) In this respect there is no distinction between possession by a Receiver, and that by sequestrators under a commission of sequestration; (*y*) and the reader is therefore referred for information as to this subject to the part of this Treatise in which the method to be pursued by persons who claim paramount to a sequestration has been pointed out. (*z*)

It may be mentioned here, that where an ejectment was actually brought against a Receiver, although it was without the previous leave of the Court, the Court made a reference to the Master, to inquire whether it would be for the benefit of the parties interested, who were adults, that the Receiver should defend the ejectment and charge the expense in his accounts. (*zz*)

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*SECTION IV. [*438]

Salary and Allowances.

The order referring it to the Master to appoint a Receiver, usually directs the Master to allow the Receiver a proper salary for his care and pains therein. (*a*) The Receiver's salary, however, is not generally fixed till the passing of the first account, when the Master allows him a *per centage* upon his receipts in his discharge for his care and pains by way of salary.

The usual allowance to a Receiver of the rents and profits of a landed estate, has generally been £5 per cent. on the gross rental; this, however, has been the *maximum:* and where the rental has been very considerable, a *per centage* at a much lower rate has been allowed, or a stated salary sufficient to compensate the Receiver's services.

In *Day* v. *Croft*, an objection was taken to the allowance to the Receiver, which had been made by the Master, of 5 per cent. on certain gross sums which had been paid to him for the redemption of mortgages and annuities, and for annuities and interest upon mortgages, and Lord Langdale thought there was sufficient in the case to warrant a reference back to the Master to review his report. (*b*)

With reference to the subject matter of the last case, it may be mentioned, that in *Haigh* v. *Grattan*, (*c*) where a Receiver had been appointed to get in the outstanding estate of a testator, the Master of the Rolls held that the Receiver had not such a vested right to collect the whole estate, as entitled him to prevent the money being paid into Court without passing through his hands, in order that he might obtain his poundage, and made an order on the petition of some of the parties interested, that a debtor to the estate who was willing to pay the amount of his debt to the Accountant General at once, might be at liberty to do so.

The subject of per centage proper to be allowed to a Receiver, [*439]
*by way of salary, has recently undergone investigation in *Day* v. *Croft*, (*d*) above referred to; and, in his judgment upon that case, Lord Langdale, M. R., who had thought it right to inquire of the Masters in general what

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(*x*) Anon. 6 Ves. 287.
(*y*) Brooks v. Greathed, 1 J. & W. 178; Gomme v. West, 2 Dick. 472.
(*z*) *Ante*, vol. 1, p. 644.
(*zz*) Anon. 6 Ves. 287.
(*a*) *Ante*, p. 429.
(*b*) 2 Beav. 488.
(*c*) 1 Beav. 201.
(*d*) 2 Beav. 488.

were the principles upon which they acted, and the practice adopted on this point in their several offices, thus states the result of his inquiries—"The Masters have each of them been good enough to furnish me with a certificate: and I find that there is no general rule, which universally prevails, as to the allowance to a Receiver. Where the receipts consist of rents of freehold and leasehold estates, £5 per cent. upon the amount received, is most frequently allowed. If there be any special difficulty in collecting the rents, on account of the sums being extremely small or of the payments being very frequent, as weekly payments, then the allowance is increased; on the other hand, if there should be very great facility in receiving the rents, then less than £5 per cent. is allowed. One of the Masters has certified to me a case where, after consideration, he allowed only £4 per cent. for the receipts of rents and profits of freehold and leasehold estates. Another Master has certified to me a case in which the sum paid to the Receiver amounted to £300 a year for the first year; the Receiver was afterwards allowed £150 only for a succession of years, which was afterwards reduced to £50 a year, for the receipt of the same rents; it cannot, therefore, be considered as an universal or general rule, that £5 per cent. should be allowed even upon the receipts of rents and profits. It may be increased if there be any extraordinary difficulty, or diminished if there be any extraordinary facility in the collection."

"With respect to other receipts each Master considers himself bound to have regard to the degree of facility or difficulty there may be in receiving them. They have sometimes allowed £2½ per cent., but for gross sums of money this has been very much reduced, and £1¼ per cent. has been allowed upon many occasions. It appears, therefore, that the Masters, as they ought, consider upon each occasion, what is fit or proper *to be allowed, having regard to the degree of difficulty or facility experienced by the Receiver." [*440]

A Receiver may be entitled to allowances beyond his salary for any extraordinary trouble or expenses he may have been put to in the performance of his duties. (*d*) The Court will not, however sanction such allowances, where they are objected to, unless the Receiver has had the previous approbation of the Court, or of the Master, for what he has done; (*e*) and upon this ground Lord Cottenham discharged an order of the Vice Chancellor, referring it back to the Master to review his report upon a Receiver's account, with reference to certain sums which the Receiver had claimed on account of journies taken by him to France, for the recovery of property belonging to the estate before the tribunals there, but which the Master had disallowed. (*f*) It is to be observed, however, that in *Malcolm* v. *O'Callaghan*, (*g*) the result of the Receiver's journies had been unfavourable, and that no benefit had accrued to the estate from the proceedings instituted; but it may be inferred, from his Lordship's judgment, that "if success had attended the exertions of the Receiver, and he could have shewn that such success had arisen from his presence in Paris," he would have considered it "inequitable for the parties to take the benefit of such exertions without defraying the expenses which had attended them, although no previous authority for incurring them had been given."

It may be mentioned here, that in a case before Sir Anthony Hart, in Ireland, where the Receiver of a lunatic's estate had instituted proceedings, which, being wrong in form, he abandoned, and afterwards took other proper proceedings which were successful for the estate; the Court refused to allow him the costs

(*d*) *Vide* Potts v. Leighton, 15 Ves. 276. (*e*) *In re* Ormsby, 1 B. & B. 189.
(*f*) Malcolm v. O'Callaghan, 3 M. & C. 52.
(*g*) *Ubi supra.*

of the abandoned proceedings, although the Master reported that the Receiver had acted *bonâ fide*, and ought to be allowed the costs. (*h*)

The proper method of objecting to a Master's report allowing *a Receiver's salary, or other expenses or allowances, where the objection is to the principle on which he has proceeded, is by petition, either praying a reference back to the Master to review his report, or for liberty to take exceptions to it, as in the case of a certificate of the taxation of costs. (*i*) [*441]

SECTION V.

Powers, Duties, and Liabilities of Receivers.

When a Receiver has been appointed of lands and tenements, his duty is to obtain the possession of such of the estates as may be in the hands of any of the parties to the cause, and to obtain the attornment of the tenants of such of them as may be let. If he is unable to accomplish this, by reason of the refusal of the party to deliver up possession of the estate, or of the tenants to attorn, he must report such refusal to the solicitor of the party on whose application the order for the Receiver was made, in order that he may take the necessary steps to put the Receiver into possession or to procure the attornment of the tenants.

It is to be observed, that, by the terms of the order, the tenants are bound to pay to the Receiver not only the rents which are accruing at the time of his appointment, but any rents which may be then due and in arrear. (*a*)

A Receiver has power, after the tenants have attorned to him, or have paid him rent, to distrain upon them for rents in arrear. Formerly an order was considered necessary to authorize such a course, (*b*) but it seems to be now settled, that if the tenant has attorned, an order is unnecessary to enable a Receiver to distrain, (*c*) unless the rents are more than one year in arrear, in which case an order is required. (*d*)

*In *Pitt* v. *Snowden*, (*e*) Lord Hardwicke said, that if there should be any doubt who had the legal right to the rents, then the Receiver, as he must distrain in the name of the person who has that right, would very properly make an application to the Court for an order; this, however, cannot apply to cases in which there has been an attornment pursuant to the order, as by such attornment the legal right to the rent is given to the Receiver, who must then distrain in his own name. [*442]

The order of appointment, as we have seen, (*f*) generally contains a direction that the Receiver shall set and let the estate with the approbation of the Master. It seems that, formerly, it was necessary, before the Receiver could set or let any part of the estate, to have an order to sanction his so doing, which was obtained as of course; (*g*) but this power is now always given by the order under which he is appointed.

(*h*) *In re* Montgomery, 1 Moll. 419.
(*i*) *Ante*, p. 87.
(*a*) *Ante*, p. 436.
(*b*) Shelly v. Pelham, 1 Dick. 120; Mitchel v. Duke of Manchester, 2 Dick. 787.
(*c*) Pitt v. Snowden, 3 Atk. 750; Raincock v. Simpson, 1 Dick. 120, (n.;) Hughes v. Hughes, 1 Ves. J. 161; 3 Bro. C. C. 87, S. C. Brandon v. Brandon, 5 Mad. 473.
(*d*) Ibid.
(*e*) 3 Atk. 750.
(*f*) *Ante*, p. 429.
(*g*) Neale v. Bealing, 3 Swanst. 304, (n.)

Under the old practice also, a Receiver could not act in any respect in the details of the management of the estate, without a special order was first obtained directing the Master to inquire into and report upon the propriety of the proceeding contemplated, but this has been obviated by Lord Lyndhurst's Orders, (*h*) by which it is ordered—"that in every order directing the appointment of a Receiver of landed estates, there shall be inserted a direction that such Receiver shall *manage*, as well as let and set, the estate with the approbation of the Master.

The above order also points out the course of proceeding to be adopted for bringing the management, or the letting or setting of the estate, under the Master's consideration; by directing that it shall not be necessary that a petition should be presented to the Court in the first instance; but that the Master, without special order, shall receive any proposal for the management or letting of the estates, from the parties interested, and shall make his report thereon; [*443] which report shall be submitted to the Court for confirmation, in the same *manner as is now done with respect to reports on such matters made upon special reference; and that, until such report be confirmed, it shall not give any authority to the Receiver.

As connected with the management of the estates, it is to be mentioned, that although a Receiver has power, in the case of a tenant from year to year who has attorned to him, to give him notice to determine his tenancy, (*i*) he cannot bring an ejectment, or take any other step towards turning him out of possession, without the Master's sanction. (*k*)

The Court will not permit a Receiver to lay out more than a very small sum at his own discretion; it is improper, therefore, for a Receiver, as well as for a guardian, to do any acts which may involve the estate in expense, without first applying to the Court for its sanction. Upon this ground, if an ejectment is brought against a Receiver, or an action for any thing done by him in the performance of his duty, he must not attempt to defend it without previously applying to the Court for its directions; and, in *Swaby* v. *Dickon*, (*l*) where the Receiver, without the authority of the Court, defended actions arising out of a distress made by him upon a tenant of the estate, for rent, the Court refused to allow him his costs of the action.

So likewise, although a Receiver may lay out small sums of money in customary repairs, or may allow the same to the tenant, the Court is not in the habit of permitting either Receivers or committees to apply the trust funds in repairs, to any considerable extent, without a previous application to the Court. (*m*)

Formerly the Court acted strictly upon this rule, and never permitted a Receiver to lay out any money whatever, on the estate, without a previous order; but now, where the Receiver has laid out money, in repairs or otherwise, without such previous order, it is usual to refer it to the Master, to see if it [*444] *has been beneficial to the estate, and, if it be found to be so, the Receiver will be allowed the money so laid out. (*n*)

When a Receiver is appointed to get in outstanding personal property, it is his duty to collect all that he can get at; to enable him to do which, the order, under which his appointment is made, usually directs the parties to deliver up to him all securities in their possession for the outstanding debts and effects, together with all books, papers, and writings relating thereto. (*o*) If the parties

(*h*) Ord. 1828, LXIV.
(*i*) Doe v. Read, 12 East. 59.
(*k*) Wynne v. Ld. Newborough, 1 Ves. J. 164; 3 Bro. C. C. 88, S. C.
(*l*) 5 Sim. 629.
(*m*) Atty. Gen. v. Vigor, 11 Ves. 563.
(*n*) Tempest v. Ord, 2 Mer. 55; Blunt v. Clitherow, 6 Ves. 799.
(*o*) *Ante*, p. 430.

in whose hands such securities or papers are, should refuse to deliver them up, the Receiver should give notice of such refusal to the party obtaining the Receiver, in order that he may take the necessary steps for enforcing the order.

It is to be observed that, by the terms of the order, the Receiver is empowered, in case it should be necessary, to put any of the debts in suit, to make use of the name of the party to whom such debt is legally due. (*p*)

A Receiver must not, however, bring any action or commence any suit for the recovery of such debt, without first obtaining the sanction of the Master to the proceeding. By the order of appointment it is, as we have already seen, (*q*) provided, that the person whose name is used is to be indemnified, out of the estate, for any loss that he may incur, by the use of his name, out of the estate and effects,—for this purpose he must apply to the Court by petition in the cause.

Where the order directs that the Receiver shall keep down the interest of incumbrances reported due by the Master, he must of course comply with that order, taking the necessary receipts upon stamps; and it is to be remembered that, in passing his accounts, the Receiver will be subject to the same rules that all other accounting parties are subject to, (*r*) and that he will only be allowed to discharge himself by affidavit, as to those payments which are under forty shillings;—for all other payments he must produce proper vouchers.

It may be mentioned in this place, that a Receiver will *be responsible for any loss which may be occasioned to the estate [*445] from his wilful default; therefore if he places money received by him in what he knew to be improper hands, the Court will oblige him to pay it out of his own pocket. (*t*) But if where rents received are large, and he, as a necessary precaution, for the purpose of remitting it to London in bills rather than in *specie*, pays it to a tradesman *who is in credit at the time*, and takes bills from him, and the tradesman afterwards fails, he will not be affected. (*u*)

So also if he deposits the moneys with a banker for safe custody, he will not be answerable for the failure of the banker, if the moneys are not mixed with his own moneys, and they were *bonâ fide* deposited for safe custody under circumstances in which they could not properly have been paid into Court. (*x*)

A Receiver, however, will be held answerable for the loss occasioned by the failure of a banker with whom he deposited moneys for security, if the deposits be made in such a way that he parts with the absolute control over the fund; therefore, where a Receiver paid the sums which he had received into a banking-house, to the joint account of his sureties, under an arrangement with them, that all drafts for the sums so paid in should be written by one of the sureties and signed by himself, it was held by Lord Brougham, and afterwards by the House of Lords upon appeal, that the Receiver was liable to the loss occasioned by the failure of the banking-house. (*y*)

The case will be the same if the Receiver deposits the money with, or remits it to, a banker for his own credit and use, and not to a separate account for the trust, and the banker afterwards fails. (*z*)

It is the duty of a Receiver to pass his account annually, unless otherwise directed by the order for his appointment, which sometimes, especially in the

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(*p*) Ibid. (*q*) Ibid.

(*r*) *Vide ante*, Vol. 2, p. 881.

(*t*) Knight v. Lord Plymouth, 3 Atk. 480; 1 Dick. 120, S. C.; *vide etiam*, Rowth v. Howell, 3 Ves. 565.

(*u*) Ibid. (*x*) Salway v. Salway, 4 Russ. 60.

(*y*) Salway v. Salway, 2 R. & M. 215; 9 Bligh, N. S. 181, sub nomine, White v. Baugh.

(*z*) Wren v. Kirton, 11 Ves. 377.

[*446] case of Receivers of personal *estate, directs the Receiver to pass his accounts half-yearly. (a)

If a Receiver does not regularly pass his accounts, he is liable to be deprived of his salary, and also to be charged with interest on the balances in his hands; and in order to enforce this liability, an order was made, on the 15th Dec., 1792, (b) whereby the Masters are directed, on the second seal after Trinity Term in every year, to certify to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal for the time being, the state of the several Receivers' accounts in their respective offices; and, by a subsequent order, dated the 23d April, 1796, (c) after stating that it appeared from the returns made by the Masters in Chancery in pursuance of the last-mentioned order, that many Receivers of estates appointed by this Court, had not been so punctual in passing their accounts, and paying their balances due thereon, as they ought to have been, *it is ordered* that the several Masters of the Court should, thereafter, fix the days upon which all Receivers, in their respective offices, shall annually procure their accounts to be delivered unto the Masters, and also the days upon which such Receivers shall pay the balances appearing due on the accounts so delivered in, or such part thereof as the Master shall certify proper to be paid by them. And it is further ordered, that, with respect to such Receivers as shall neglect to deliver in their accounts, and pay the balances thereof at the times so to be fixed for that purpose, as aforesaid, the several Masters to whom such Receivers are accountable, shall from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the salaries therein claimed by such Receivers, but also charge them with interest after the rate of 5 *per cent. per annum* (d) upon the balances so neglected to be paid by them during the time the same shall

[*447] appear to have remained in the hands of such Receivers. And that every *Receiver, acting under the authority of this Court, shall, in each year, procure his annual accounts of receipts and payments respecting the estate entrusted to his care, to be examined and settled by the Master whose duty it may be to inspect the same, within the space of six months next ensuing the time appointed by such Master for the delivery of such account into his office, as is hereinbefore directed. And in case any Receiver shall, at any time hereafter, neglect so to do, a certificate of every such default is hereby required from the Master in whose office such neglect or default shall happen.

It is to be observed that the above order authorizes the Masters to fix the times for Receivers bringing in *annual* accounts only, and that upon the first appointment of the Receiver. To remedy the inconvenience experienced from this circumstance, the order of 1828 has provided, that the Masters, in acting upon the order of the Court of the 23d of April, 1796, shall be at liberty, upon the appointment of a Receiver, or at any time subsequent thereto, in the place of annual periods for the delivery of the Receiver's accounts and payment of his balances, to fix *either longer or shorter periods at his discretion;* and when such other periods are fixed by the Master, the regulations and principles of the said order shall in all other respects be applied to the said Receiver. (e)

Acting upon the order of the 23d April, 1796, Lord Eldon directed that a Receiver of the personal estate of a testator not passing his accounts and paying in his balances, should be deprived of his salary. He also directed him to be charged with interest, but not upon each sum, from the moment at which it came into his hands, but in the same manner that an executor is charged with

(a) Seton on Dec.
(b) Beames Ord. 454.
(c) Ibid. 461; 15 Ves. 278.
(d) Beames Ord. 462.
(e) Ord. 1828, LXIII.

interest, *i. e.* by making yearly or half-yearly *rests* in the account. (*f*) And it appears that this rule will be applied as well in cases where the Receiver has been discharged as where he is still in office; therefore, where a Receiver who had been discharged had not paid in his balance, *he was ordered, upon motion, to pay in the same, and also the amount allowed for [*448] his salary, together with interest on both sums, at 5 per cent., from the day appointed by the Master, and the costs of the motion. (*g*)

It is to be observed, that, in *Fletcher* v. *Dodd*, (*i*) Lord Loughborough said that he would make a Receiver pay interest, if he keeps money in his hands a quarter of a year after it ought to have been paid into Court; and in that case, notwithstanding it appeared that he had passed his account before the Master, and all the parties had declared themselves satisfied, his Lordship, under the peculiar circumstances of the case, directed the Master to inquire what money he had received from time to time, and how long he had kept it in his hands.

In ——— v. *Jolland*, (*h*) Lord Eldon appeared to think, that if such a case should be brought before him, he should direct a Receiver to make good any loss which might be occasioned from a difference in the price of the funds between the time when the Receiver's balances were paid in and the time when they ought to have been paid in.

In *Hicks* v. *Hicks*, (*k*) where a Receiver had been appointed during the minority of an infant who had no guardian, and was directed to place out the surplus of the rents and profits when they should amount to a competent sum, on government or other securities, but omitted so to do, Lord Hardwicke directed that he should pay interest at the rate of 4 per cent., on the surplus rents and profits, from the date of the decree till the infant came of age, although the infant, two days after he came of age, settled accounts with the Receiver, who delivered up his vouchers, and gave him copies of all the accounts passed by the Master, &c. In that case, Lord Hardwicke held that it was no excuse for the Receiver to say—that the buildings and farms were in a ruinous condition, and the tenants constantly breaking, and that it was therefore necessary for the Receiver to keep a balance in his hands for rebuilding *and repair- [*449] ing, or for stocking empty farms; because it is not to be supposed that he could, in such matters, exhaust the funds received. (*l*) He also held, that there was no force in the argument derived from the fact of the Master having given no directions for the investment of the money, because "it was the duty of the Receiver to remind the Master to lay out the surplus rents as often as they amounted to a competent sum." (*m*) It is to be observed, however, that, in the above case, the infant had no guardian, and that where he has a guardian, if the Receiver accounts with such guardian, he will not be obliged to account over again with the infant when he comes of age. (*n*)

It may be remarked in this place, that although a Receiver is only bound, by his recognizance, to pass his accounts yearly, he may at any time apply to the Court to pay in the moneys in his hands, and that if in the interval between passing his accounts, he receives sums of such an amount as to make it worth while to lay them out, he ought to apply for an order to have them paid into Court, that they may be then made productive for the benefit of the estate. (*o*)

(*f*) Potts v. Leighton, 15 Ves. 273; *vide etiam*, ——— v. Jolland, 8 Ves. 72; Fletcher v. Dodd, 1 Ves. J. 85.
(*g*) Harrison v. Boydell, 6 Sim. 211.
(*h*) 8 Ves. 73.
(*i*) 1 Ves. J. 85.
(*k*) 3 Atk. 274.
(*l*) 3 Atk. 274.
(*m*) Ibid.; *vide* Earl of Lonsdale v. Church, 3 Bro. C. C. 41.
(*n*) Clavering's case, Prec. in Chan. 535; 2 Eq. Ca. Ab. 9, c. 7, S. C.
(*o*) Shaw v. Rhodes, 2 Russ. 539; *vide etiam* Hand's Practice, p. 183. Where an order of this nature may be found.

[*450]

*SECTION VI.

Of Receivers' Accounts.

If a Receiver does not bring in his account within the time limited by the Master, the party desirous of having it brought in, may take out first a general warrant, and then a peremptory warrant, for him to bring in his account; and, upon default, the Master certifies, and upon the certificate being filed, the party is entitled, as of course, to an order that he do bring in his account within four days or stand committed. Upon an affidavit of personal service of the order, and the Master's certificate that no account has been brought in, the order is made absolute upon motion of course, and the Receiver is turned over to the Fleet. (*p*)

If the Receiver brings in his accounts, but fails to proceed upon them, the party prosecuting the order takes out and serves, on the Receiver's solicitor, a warrant to proceed on the accounts, and that if the Receiver does not attend, the Master allows the sums wherewith he has charged himself, and disallows his payments for want of being vouched. (*q*)

The form of a Receiver's account may be obtained from the Master's Office; it comprises the situation of the estate, the names of the tenants, arrears of rent of the preceding year, rents due, rents received, arrears due; and lastly, observations, &c. The money paid and allowances made to tenants, and the Receiver's salary, are then stated and regularly disposed in columns. This account is passed by the Receiver leaving a copy at the Master's Office, and taking out a warrant upon leaving, and warrants to proceed, serving them upon the Clerks in Court for the parties interested, and attending and producing proper vouchers and receipts for the moneys paid, which the Master should mark as produced: the Receiver's bill of costs, for passing his accounts, should also

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be brought in, and the usual warrants "on leaving" and "to settle" should *be taken out, served, and attended. The account is entered in a book kept at the Master's Office, a duplicate of which containing a copy of the account, is entered in another book, which the Master's Clerk delivers out to the Receiver after the Master has made his report. The account must be verified by the affidavit of the Receiver, which is annexed to each yearly account in the Master's book. The Master will then make his report of passing the account, copies of which must be taken by the Receiver and the solicitors for the parties interested, and the usual warrants "on *preparing*" "*to settle*" *and* "*to sign*," must be taken out by the Receiver, served and attended. The report, which requires no confirmation by the Court, (*r*) must be filed at the Report Office, and an office copy taken. (*s*)

The balance in the Receiver's hands must be paid into Court *immediately* after the Receiver's account is reported by the Master, and for this purpose *no new order is required:* the Receiver should apply to the Accountant General for the usual direction to pay the balance into the bank, and which will be given to him upon his producing the order under which his appointment is made and the report appointing him; the order always provides for payment of the Receiver's clear balance into the bank. This order, with the Master's report

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(*p*) 1 Smith's Ch. Pr. 645. (*q*) Ibid.
(*r*) Cowper v. Earl Cowper, 2 P. Wms. 729.
(*s*) 1 Turn. & V. 468.

upon passing the Receiver's account, will be sufficient for the Accountant General. and he will give the requisite directions to the bank. (*t*)

When the order for appointing a Receiver does not provide for the payment of his balances into the bank, the Receiver will not be allowed to avail himself of the omission, and to keep a balance in his hands without interest, under a pretence of waiting for some party in the cause to obtain an order upon him for payment; he ought, upon his own application, to obtain an order, the costs of which will be allowed him by the Master in his account, and, unless he does so, the Court will charge him with interest. (*u*)

*The course of proceeding to enforce payment of the balance by a Receiver, is either by putting his recognizance in suit, or by obtaining an order upon the Receiver for payment, of the balance reported due, on a day to be named; (*x*) for which purpose, an application for an order must be made by motion upon notice, supported by the Master's report; and the order be drawn up, passed, entered, and served *personally* upon the Receiver. If he absconds, an order must be obtained, that service by leaving the order for payment at his dwelling with one of the family may be substituted. (*y*) [*452]

It is to be observed, that to enforce the payment of a Receiver's balance by committal, there must be three orders: the first merely directing the balance to be paid by a particular day, which, as above stated, must be personally served; and the second, or order *nisi*, that he may pay it within a certain limited time, viz: a week, or stand committed, (which second order is necessary though the Receiver has appeared upon the motion for the first order and prayed for time. (*z*)

After the second order or order *nisi* has been served, there must, if the balance be not paid within the time limited, be a third order for a committal. This may be obtained, as of course, upon affidavit of service of the order *nisi*, and production of a certificate, by the Accountant General, of the money not having been paid in.

It is to be observed, that, where a Receiver dies, the Court has no jurisdiction to order, in a summary way, that his executor shall bring in and pass his accounts, and pay the balance found due out of his assets. (*a*) The proper course, in such a case, if the balance is not ascertained so that the recognizances may be put in suit, is to file a bill against his personal representative for an account; but this course may be avoided, if the representatives of the Receiver will consent to an order to pass the Receiver's accounts and to pay the balance. (*b*)

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*When the Receiver's recognizances are to be put in suit, an order must be obtained to authorize it, otherwise the names of the Master of the Rolls, and of the Master with whom the recognizances are entered, cannot be made use of. (*c*) This order must be obtained upon motion or petition, of which notice must be given to the Receiver, and if the sureties are to be proceeded against, notice of the motion or the petition must also be served upon them. [*453]

When the order has been obtained it must be taken to the Petty Bag Office, where the following proceedings will be adopted. (*d*)

(*t*) 1 Turn. & V. 469.
(*u*) Potts v. Leighton, 15 Ves. 274.
(*x*) Davies v. Calcraft, 14 Ves. 143.
(*y*) 1 Turn. & V. 470.
(*z*) Davies v. Calcraft, *ubi supra*.
(*a*) Jenkins v. Briant, 7 Sim. 171.
(*b*) *Vide* order in Littleboy v. Spooner, Seton on Dec. 332.
(*c*) 1 Smith's Ch. Pr. 646.
(*d*) The author is indebted for the following statement of the proceedings upon a Receiver's recognizances, to Mr. Abbot of the Petty Bag Office, *vide etiam* Curs. Canc. 500.

By the recognizances entered into by Receivers and their sureties, they, the cognizors, acknowledge themselves to be indebted to the cognizees (usually the Master of the Rolls and the senior Master of the Court,) in certain sums of money to be paid on certain days therein mentioned; in default of which they will and agree that the said sums shall be levied and recovered of them, their heirs, executors, and administrators, and of all and singular their lands and hereditaments, goods and chattels; the recognizance however is subject to a condition for making it void if the Receiver shall duly account for the rents and profits of the estate of which he is appointed Receiver.

When these recognizances are inrolled they are perfected, and being then acknowledgments of debts upon record, are much like unto judgments at law, and have been sometimes so called. (*e*) However, though the Receiver makes default in not performing the condition of the recognizance, execution is not to be sued out, nor is the recognizance to be put in suit till the parties interested in the estate have obtained an order of the Court for that purpose.

This being done, the course of proceeding against the cognizees is by *scire facias* requiring them to show, if they have any thing to say, why the cognizee should not have execution. This writ, in personal actions, is given by the
[*454] statute of Westminster the *2nd,—(13th Edward the 1st, c. 45;)
for at common law it lay only on judgments in real actions; and in personal actions, when debt and damages were recovered, if the judgment was above a year's standing, the plaintiff had no remedy against the defendant but by new action of debt on his judgment.

The words of the act are these—"Because that of such things as be recorded before the Chancellor and the Justices of the King that have record and be inrolled in their Rolls, process of plea ought not to be made by summons, attachments, essoin, and other solemnities of the Court, as hath been used to be done by bargains and covenants made out of the Court. It is to be observed, from henceforth, that those things which are inrolled before them that have record, or contained in ffines, whether they be contracts, covenants, obligations, services, or customs knowledged, or other things whatsoever inrolled, wherein the King's Court without offence of the law and custom may execute their authority, from henceforth they shall have such vigour that hereafter it shall not need to plead for them, but when the plaintiff cometh to the King's Court, if the recognizance or fine levied, be fresh (that is to say) levied within the year, he shall forthwith have a writ of execution of the same recognizance made; and if the recognizance be made or the ffine levied of a further time passed, the Sheriff shall be commanded that he give knowledge to the party of whom it is complained, that he be before the justices at a certain day to shew, if he have anything to say, why such matters inrolled or contained in the fine ought not to have execution; and if he do not come at the day, or peradventure do come, and can say nothing why execution ought not to be done, the Sheriff shall be commanded to cause the thing inrolled or contained in the ffine to be executed."

The record of the recognizance, or rather the judgment, being in Middlesex, the first *scire facias* is to be directed to the Sheriff of that county, although the cognizors live in other counties; and, upon a *nihil* returned, an *alias scire*
[*455] *facias* issues into the county or counties where the cognizors, their *heirs, executors, or administrators live, or where the land of a deceased cognizor lies, as the case happens to be.

Thus if the Sheriff of Middlesex returns a *nihil* as to one of the cognizors, a *mortuus* as to another, and a *scire feci* as to the third, in this or the like case

(*e*) 2 Bulstr. 62.

you proceed against them separately, by issuing an *alias* against the cognizor returned *nihil*, another against the heir and tertenants of the deceased cognizor, and as to the cognizor who has been warned and a *scire feci* returned, you give a rule with the Six Clerk to this effect:

Halford v. *Creed.* } Unless the defendant answer on the morrow of the Holy Trinity next to come, let judgment be entered.

If the party against whom this rule is given does not appear and plead by the time the rule is out, you sign judgment and issue execution.

The process to be issued in execution is either a *capias ad satisfaciendum* a *levari facias* or *an elegit.*

If an elegit is sued out, it must be returned, because an inquisition is to be taken upon it by the Sheriff, whereby the Court may judge of the sufficiency thereof; and, when executed, returned, and filed, the plaintiff shall have no other execution, (*f*) but he may have as many *elegits* into as many different counties as he thinks fit, and execute all or any of them at his pleasure.

If the cognizors, their heirs, executors, or administrators, appear and plead, you proceed and go to issue according to the rules of the office, make up and seal the record, and transmit it into the Court of King's Bench to be tried, as in the case of other personal actions; and when the record is so transmitted, it remains there, and judgment is entered up upon it, as upon a record of that Court. (*g*)

*It may be mentioned, that, in *Walker* v. *Wild*, (*h*) where a Receiver absconded and proceedings were taken upon his recogni- [*456] zance, one of the sureties applied for and obtained an order for a reference to the Master, to see what was due from the Receiver, and that he (the surety) might be at liberty to pay in the amount by instalments, so as such amount did not exceed the recognizance, and for a stay of the proceedings in the meantime, and that the Court made the order, upon the surety paying the costs of the motion and of the subsequent proceedings in consequence of it.

It is to be noticed, that, if there is any proceeding at law upon the recognizance, the penalty of the recognizance is the debt for which the execution will be issued. (*i*) The Receiver, therefore, or his sureties, if they wish to avoid the consequences of the forfeiture of the recognizance, must apply to the Court to stay the proceedings upon his paying in the amount actually due; (*k*) and it seems, from the judgment of Lord Eldon, in *Dawson* v. *Raynes*, (*l*) before referred to, that even the sureties will not be relieved from the effects of the recognizance, unless they pay in all that the Receiver himself could have been required to pay. (*m*) In that case, the Vice Chancellor was of opinion that

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(*f*) 1 Levinz, 92.

(*g*) Recognizances entered into by order of the Court, for any other purpose than that of receiving the rents and profits of estates, are proceeded upon in the same manner.

Recognizances between party and party, for the payment of sums of money, are sometimes, but not often, at this day acknowledged and inrolled in the Court of Chancery, and if put in suit are to be prosecuted by *scire facias* in the same manner, with this difference, that as they are not entered into by order of the Court, there needs not any order for putting them in suit.

Bonds given to the King in matters of lunacy are likewise prosecuted by *scire facias*, but those bonds being prepared and in the keeping of the Clerk of the Custodies, the first writ is issued by him; this writ being returned, and filed in the Petty Bag, the subsequent proceedings are the same as in the case of recognizances above mentioned.

(*h*) 1 Mad. 528.

(*i*) *Vide* the certificate of the Judge of K. B., in Dawson v. Raynes, 2 Russ. 466–468.

(*k*) *Vide* Walker v. Wild, 1 Mad. 529. (*l*) *Ubi supra.*

(*m*) *Vide* Gereerside v. Benson, 3 Atk. 248.

the sureties were not liable to pay the interest on the Receiver's balance, which the Receiver had been ordered to pay; but Lord Eldon, upon the case being brought before him by appeal, held the general rule to be that where the principal debtor is obliged to pay interest, there can be no equity that the surety should not pay the interest in default of the principal. Under the peculiar circumstances of the case, however, viz: the Receiver having been bankrupt, [*457] with the knowledge of all parties, for a considerable *length of time, during which no steps were taken to compel the passing of his accounts, his Lordship affirmed the Vice Chancellor's order.

It may be mentioned here, that if the surety of a Receiver has paid any thing on his account, for the benefit of the estate, he is entitled to be indemnified out of the balance due to the Receiver. (*n*)

SECTION VII.

Discharge of.

When a Receiver has been appointed, and has given security, he cannot be discharged upon his own application, without shewing some reasonable cause, by affidavit, why he should put the parties to the expense of a change. (*a*)

So, also, with regard to the sureties, it has been laid down, by Lord Hardwicke, that if people voluntarily make themselves bail or sureties for another, they know the terms; and will be held very hard to their recognizance, and not discharged at their request to have new sureties appointed, for then there would be no end of it;—no regard, therefore, is due to their application, unless for the benefit of the parties in the cause, or something of that sort. (*b*)

An instance of a Receiver being discharged on his own application, (on the ground of ill health,) may be found in *Richardson* v. *Ward*, (*c*) in which case he was not only discharged and his recognizance ordered to be vacated, but he was allowed, although this part of the application was opposed, to retain his costs "of the application, and incidental thereto," out of the balance in his hands.

[*458] A Receiver is generally continued till the decree, but if the *right of the plaintiff ceases before that time, the Receiver may be discharged, and cannot be continued at the instance of a defendant; upon this ground, Lord Eldon determined, in *Davis* v. *the Duke of Marlborough*, (*d*) that where the plaintiff had been satisfied by the payment of his demand, the order for the Receiver must be discharged, although the discharge was opposed by two creditors having prior annuities to the plaintiff's; his Lordship observed, "I apprehend that with the right of the plaintiff to have a Receiver, must fall the rights of the other parties; it would be most extraordinary, if, because a Receiver has been appointed on behalf of the plaintiff, any defendant is entitled to have a Receiver appointed on his behalf; my decided opinion is that the order for a Receiver must be discharged, and that all falls together; the defendants may file a bill, but the appointment of a Receiver would not have affected their legal estate." (*e*)

(*n*) Glossup v. Harrison, 3 V. & B, 134; Coop. 61 S. C.
(*a*) 2 Harr. Ed. Newl. 503. (*b*) Griffith v. Griffith, 2 Ves. 400.
(*c*) Mad. & Geld. 266. (*d*) 2 Swanst. 108—168.
(*e*) Ibid.; *sed vide* Largan v. Bowen, 1 Sch. & Lef. 296

In a recent case, in which a Receiver had been appointed in a suit for the removal of trustees, and the appointment of new ones, upon the ground of misconduct on the part of one, and of age and infirmity on the part of the other, upon new trustees being appointed, in pursuance of the decree, an application was made on the part of the plaintiff to discharge the Receiver, on the ground that the new trustees were willing to act; and the Master of the Rolls, Lord Langdale, made the order, although it was opposed by some of the defendants, who were beneficially interested in the property as legatees, upon the trustees undertaking, without entering into recognizances to account before the Master, half yearly, in the same way as the Receiver. (*f*)

The appointment of a Receiver, made previous to a decree, will be superseded by it, unless the Receiver is expressly continued. (*g*) A Receiver, however, is never discharged by decree; but the application for his discharge must be made by petition, (*h*) previously to the hearing of which, the Receiver *must pass his final account, and obtain the Master's [*459] report, and the Accountant General's certificate of the payment of the balance reported due into the bank, or the order for payment to the person intitled to receive it; and the usual course of proceeding upon petition must be pursued. Copies must be served upon the Clerks in Court for all the parties interested, and upon the Clerk of the Inrolments; and the solicitor must be prepared with the Master's report upon passing the last account, the Accountant General's certificate of the balance being paid in by the Receiver, or the order and receipt for payment of the balance to the party intitled, and other material documents, and an office copy of the affidavit of service of the petition; and upon hearing the petition an order will be made for vacating the recognizance, which must be drawn up, passed, and entered, and taken to the Clerk of the Inrolments; and care should be taken that the recognizance be vacated, otherwise if a material error should afterwards be discovered in the Receiver's account, the money may be recovered. (*i*)

It may be mentioned in this place, that where, in consequence of the absence abroad of an executor, a Receiver had been appointed under the 38 Geo. 3, c. 8, s. 3, (*k*) and administration was afterwards granted under the same act to another person, Lord Eldon held that the act was defective in not providing for the discharge and accounting by the Receiver under such circumstances, and he therefore thought the best thing he could do, was to refer it to the Master to reconsider the appointment of a Receiver, regard being had to the circumstance of administration having been granted.

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*SECTION VIII. [*460]

Liabilities and Rights of Sureties.

The sureties of a Receiver cannot be discharged at their own request; where, therefore, an application was made to discharge a Receiver on the ground of misconduct, and the sureties joined in the application, Lord Hardwicke held that no regard was to be held to their application, unless it was for the benefit

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(*f*) Bainbrigge v. Blair, 3 Beav. 422.
(*g*) *Vide* Gibson v. Lord Monfort, Seton on Dec. 330.
(*h*) Gilbert v. Whitmarsh, 24th Feb., 1818, Coram Leach, V. C. 2 Mad. Ch. Pr. 298, ed. 1837.
(*i*) 1 Turn. & V. (*k*) *Ante*, Vol. 1, p. 295.

of the parties in the cause, or something of that kind—"for if people voluntarily make themselves bail or sureties for another, they know the terms, and will be held very hard to their recognizance, and not discharged at their request to have new sureties appointed, for then there would be no end of it." (*a*)

But although the general rule is not to discharge the surety of a Receiver on his own application during the continuance of the Receivership, such rule will yield to circumstances,—"as where underhand practice is proved, and the person secured shewn to be connected with such practice." (*b*)

It seems that where a surety does procure his discharge during the continuance of the Receivership, the Receiver must enter into a fresh recognizance. (*c*)

With respect to the amount of a Receiver's liability, there seems to be little doubt but that it extends to all that the Receiver would have been required to pay. (*d*) This point came before Lord Eldon, upon the question whether the sureties of a Receiver were liable to pay interest upon the balance in a Receiver's hands when he became bankrupt, and his Lordship said—"It seems to me that it would be difficult to say that where the principal debtor would be obliged to pay interest, there would not be an equity that the surety should pay interest *in default of the principal. The penalty is forfeited by the breach of the condition; the amount of a penalty is the debt due from the sureties at law. How can they have a right to be discharged, in this Court, from their legal liability till they have paid all that the principal could have been required to pay?" (*e*)

[*461]

This rule, however, is capable of relaxation where the circumstances of the case will warrant it; accordingly, as the Receiver, in the case referred to, had been bankrupt with the knowledge of all parties for a considerable time, and no steps had been taken to compel the passing his accounts, Lord Eldon refused to make the sureties pay interest. (*f*)

It seems that, where a Receiver has become bankrupt and the sureties are likely to be called upon to pay the balance due from him, liberty will be given to them to attend the passing of the Receiver's account. (*g*)

Where an action is brought against a Receiver's surety upon the recognizance, the proper course for him to pursue, appears to be, to apply to the Court, by motion, to stay the proceedings on the recognizance, offering at the same time to pay the amount due from the Receiver, so as the same does not exceed the amount of the recognizance, into Court; and, upon such motion, the order will be made upon the surety's paying the cost of the application, and of the proceedings consequent upon it.

When the Receiver's account has not been taken, the motion should also pray a reference to the Master to see what is due from the Receiver; and it seems that, upon such application, the Court will indulge the surety by allowing him to pay the balance in by instalments. (*h*)

When a surety is called upon to pay anything on account of the Receiver, he will be entitled to stand in the place of the Receiver for anything which may be coming to him in the suit; therefore, where the Receiver of the Opera House had borrowed money from his surety to enable him to make the necessary payments to the tradesmen and *others connected with the theatre, Lord Eldon decided that the surety was intitled to be repaid the amount lent, out of the balance in Court reported due to the Receiver. (*i*)

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(*a*) Griffith v. Griffith, 2 Ves. 400; *vide* Gordon v. Calvert, 2 Sim. 253.
(*b*) Hamilton v. Brewster, 2 Mol. 407.
(*c*) Vaughan v. Vaughan, 1 Dick. 90; Blois v. Blois, ib. 337.
(*d*) Dawson v. Raynes, 2 Russ. 6; *ante*, p. 456.
(*e*) Ibid.
(*f*) Ibid.
(*g*) Ibid. 467.
(*h*) Walker v. Wild, 1 Mad. 528.
(*i*) Glossup v. Harrison, Coop. 61; 3 V. & B. 134.

SECTION IX.

Managers and Consignees.

WHERE a Receiver is required for the purpose not only of receiving rents and profits, or of getting in outstanding property, for the purpose of carrying on or superintending a trade or business, he is usually denominated "a manager" or "a Receiver and manager."

The most usual cases in which managers are appointed, are those in which partnership trades are to be carried on, or which relate to mines or collieries. The grounds upon which the Court usually acts in making appointments in cases of this description have been already pointed out. (*a*) It may, however, be useful in this place to refer more fully to the principle upon which the Court proceeds, which may be collected from Lord Eldon's judgment in *Jefferys* v. *Smith*, (*b*) which has been already referred to. (*c*) In that case his Lordship observed—"The question is, whether mines have not always been considered, not altogether, but in some sort, as a species of trade; how it may be in Wales, I don't know, but in my country, where there are frequently twenty owners of the same mine, if each is to have a set of miners going down the shafts to work his twentieth part, it would be impossible to continue working the mine; must not a contract be implied that it was agreed to be carried on in a practicable and feasible way? I believe I have a note of a case, before Lord Hardwicke, which confirms me in the idea, that where there are part owners of a mine and they cannot by contract agree to appoint *a manager, this Court will manage it for them." His Lordship subsequently said, "the case [*463] I alluded to was one before Lord Hardwicke, in 1737, and it probably did not occur to Lord Thurlow when he expressed his doubt as to the interference of this Court in the case of trespass. Lord Hardwicke, in that case, says that a colliery is to be considered in the nature of a trade, and where persons have different interests in it, it is to be regarded as a partnership, and that the difficulty of knowing what is to be paid for wages and the expenses of management, gives the Court a jurisdiction as to the mesne profits which it would not assume with respect to other lands. On this ground, and on account of the peculiarity of this species of produce, the Court gives an injunction against trespass, and allows a party to maintain a suit for the profits which in other cases it would not do. Here there are twenty shares, and if each owner may employ a manager and a set of workmen you destroy the subject altogether, it renders it impossible to carry it on. It appears to me, therefore, upon general principles, without reference to the particular circumstances of the case, that where persons are concerned in such an interest in lands as a mining concern is, this Court will appoint a Receiver, although they are tenants in common of it."

But a manager will not be appointed in mining concerns at the instance of a plaintiff not having the legal interest, who, after standing by and suffering the defendant to incur great expense and risk, comes forward upon the concern turning out profitable and claims an equitable interest. This was held, by Lord Rosslyn, in the case of *Senhouse* v. *Christian*, which was cited with approbation by Lord Eldon in *Norway* v. *Rowe*. (*c*)

In *Norway* v. *Rowe*, also, a Receiver was refused under similar circumstances. There the plaintiff, an administrator, claimed a partnership in the equitable interest, fresh leases or rather licenses to work the mines having been

(*a*) *Ante*, pp. 417, 418.
(*b*) 1 J. & W. 298.
(*c*) *Ante*, pp. 417, 418.
(*c*) 19 Ves. 159.

obtained by the defendant, and the mines having been worked for some time under those leases accordingly. It is to be observed, also, *that in [*464] *Rowe* v. *Wood*, (*d*) it was held, that when a mortgagee of mines has become a partner, by purchasing shares in them, he is not to be regarded solely in his character of mortgagee, and though a Receiver would not be appointed against him as mortgagee, if he denied that his mortgage was satisfied, yet it would seem that the management must be considered with reference to the benefit of the copartner as well as the rights of mortgagor and mortgagee, and it would be difficult to make out that the mortgagee could wholly exclude his partner from interference in the partnership. In that case it appeared, that there were subsequent agreements, the effect of which, Lord Eldon thought, gave the plaintiff a clear right to control the working of the mines, and his Lordship, although he declined to appoint a Receiver in the first instance, intimated that if the plaintiff should be impeded in the exercise of his rights, another application by him to the Court, after the other parties had been apprized of what the Court expected them to do, would be differently treated.

Where the suit concerns plantations in the West Indies, the carrying on of which partakes of the nature of a trade, it is also usual to appoint managers. In the latter case, however, and in cases of a similar description where the estates are abroad, and the manager must necessarily be resident there, it is usual to add to the order directing the appointment of a manager, an order for the appointment of one or more consignee or consignees resident in this country, to whom the produce of the plantation in question may be remitted and by whom it may be disposed of.

The form of proceeding under an order for the appointment of a manager and consignee, is nearly the same as that under an order for the appointment of a Receiver.

It is to be observed that a manager in the West Indies as well as a Receiver in the East Indies, has larger power as to letting and managing than a Receiver here. In a leading case on this subject, before Lord Thurlow, a motion was made that the manager of an estate in one of the West India colo- [*465] nies *might give security faithfully to manage the estate, and to consign the produce to persons in England named in a former order; and his Lordship, in giving judgment, observed—"He must either employ the produce on the island or remit it here, as the nature of the service requires. To assign, or otherwise account for the produce, I take to be the proper form. As to giving security faithfully to manage, that is beyond the idea I have entertained of it. The security given by a Receiver here does not relate to the faithful management; but he gives security duly to account for the produce of the estate in his hands. He cannot set and let, or make expenditures upon the estate without an application to the Court. A manager there may in the discretion given to him make expenditures. Perhaps that may be a reason for it. If the order is, that he shall account for the produce, the consignments will make part of the account. Remitting here is at the expense of 2½ per cent. You would ruin the estate by insisting on his remitting such part as could be applied there. Take an order that he shall account for the produce of the estate, of what he receives and what he applies there; and for consigning, so far as the management of the estate requires it, to the particular persons named in the former order." (*e*)

It is to be observed, that, in *Forbes* v. *Hammond*, (*f*) a manager was appointed of a West India estate, without giving any security whatever; but, in

(*d*) 2 J. & W. 553.
(*e*) Morris v. Elme, 1 Ves. J. 139.
(*f*) 15 Jan., 1811, Reg. lib. A. 1810, fo. 178; Seton on Dec. 327.

Rutherford v. *Wilkinson*, (*g*) the Master of the Rolls, Lord Gifford, stated that that case was under special circumstances, and that in general, to warrant such a course, it should appear, by the report, that no manager could be found who would give security, or that the proposed person was fit to be appointed without security: under the circumstances of the case, however, his Lordship made the order for the appointment to be without security, with the consent of such of the parties as were capable of consenting.

*It is to be remarked that the Court, in dealing with property in a colony, will provide against the inconvenience likely to arise from [*466] the death, absence, or incapacity of the manager in existence, or appointed by the Court, by appointing another manager to act in such event; (*h*) some doubt, however, appears to have been entertained, by the Master of the Rolls, as to whether a consignee in this country could be appointed, prospectively, to act in the event of the death of another, and although his Honor made the order in that case, he seems to have done so provisionally only, with the view to the question being discussed upon the report. (*i*)

A manager of a West India estate is entitled to a commission on the produce sold or remitted, so long as he is resident in the island and personally acting; but if he is absent, he is not entitled to the commission himself, but he will be allowed all such sums as he has paid to others for the management of the estate during his absence, provided the payments are reasonable. (*k*)

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*CHAPTER XXXV. [*467]

PAYMENT OF MONEY, ETC. INTO COURT.

SECT. 1.—*In what Cases directed.*

ONE of the most ordinary methods by which the Court enforces its jurisdiction of preserving property in dispute pending a litigation, is by ordering it to be brought in and deposited with the Accountant General of the Court.

This officer is a new officer appointed pursuant to the stat. 12 Geo. 1, c. 32, and stands in the place of the Masters and Usher, and does all such matters, and things relating to the delivery of the suitors' money and effects into the bank, and taking them out by order, and keeping accounts with the bank, as were formerly done by the Masters and Usher. (*a*)

The payment of money or the transfer of stock into Court, is most usually ordered on interlocutory application in the case of personal representatives or other persons filling the characters of trustees having money in their hands, or stock under their control, which belong either wholly or in part to the plaintiff.

It appears formerly to have been thought necessary for the plaintiff to shew, in support of an application of this nature, that the executor or trustee had abused his trust, or that the fund was in danger from his insolvent circum-

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(*g*) Seton, *ubi supra, ex relatione* Tinney.

(*h*) Rutherford v. Wilkinson, Seton on Dec. 327.

(*i*) It is stated, in Seton on Decrees, p. 327, that such orders have been since repeatedly made, but it is to be observed, that the instance referred to, of Rutherford v. Wilkinson, is one relating to the appointment of a manager.

(*k*) Forrest v. Elwes, 2 Mer. 68.

(*a*) 1 Harr. ed. Newl. 23.

stances, but the Court will now order so much of the trust estate as he admits [*468] to be in his hands, to be paid into Court, whether *he has abused his trust or not, and without requiring proof of any danger to the property pending the litigation. (*b*)

In *Blake* v. *Blake*, (*c*) Lord Redesdale appears to limit the rule, as regards personal representatives, to cases in which there are no debts, or the debts are all paid and there is no purpose for which the money is to be left outstanding; but the rule appears to be much more extensive, and any balance which may be in the executor's hands will be ordered into Court, notwithstanding there are demands upon it to which the executor is liable. Thus, in *Yare* v. *Harrison*, (*d*) an executor having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into Court, although he stated that an action at law was depending against him for a debt to a considerable amount due from the testator. The Court, however, gave the executor liberty to apply, in case the plaintiff in the action should recover against him; and it is to be observed that, upon a verdict being recovered at law for upwards of £1700, the executor applied to the Court that it might be paid out to him, to satisfy the verdict, but that the Court ordered the money to be paid to the plaintiff in the action, and not to the executor; and, upon a suggestion that the executor had incurred unnecessary costs and interest, by defending the action, the consideration of the question—whether the defendant should not answer personally to the estate for the amount of such interest and costs, was reserved to the hearing.

The same principle will apply to other persons than executors, who fill the character of trustees, whether they be such by virtue of an actual appointment or by implication. Upon this principle, the Court has ordered an auctioneer to pay into Court the balance of the deposit upon a sale, admitted by him to be in his hands after deducting his claims as auctioneer. (*e*) Upon the same principle, where a testator having a debt secured on lands, bequeathed the debt to the mortgagor, with a desire that he would give a reversionary interest therein [*469] to a *third person, and the mortgagor sold the estate, he was ordered to bring the mortgage money into Court, for the benefit of the devisee, subject to his own life estate; (*f*) and so where the defendant had covenanted to pay a sum of money to the trustees of his marriage settlement, but had omitted to do so, whereupon a bill was filed against him for the performance of the trusts of the settlement, to which he put in his answer admitting the settlement, and that the money in question was in his hands, he was ordered to pay it into Court. In making this order, the Court acted upon the principle that where an answer contains a clear admission that there is trust money in the hands of the defendant, the Court will make an interlocutory order for securing it. (*g*)

So also where an executor admits a sum of money to be due from him, in his individual character, to his testator, the Court will order the amount to be paid into Court; (*h*) and this was done by Lord Eldon, notwithstanding a statement in the answer that the debts of the testator were not all paid, and that there were several outstanding to which the executor was liable. (*i*)

It is to be observed that, in such cases, the Court proceeds upon the ground that, as the persons to pay and persons to receive are the same, it assumes that

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(*b*) Strange v. Harris, 3 Bro. C. C. 365; and *vide* Blake v. Blake, 2 Scho. and Lef. 26; Rutherford v. Dawson, 2 B. & B. 17. (*c*) *Ubi supra.*

(*d*) 2 Cox, 377, *sed vide* Betagh v. Concannon, 2 Moll. 559.

(*e*) Yates v. Farebrother, 4 Mad. 239. (*f*) Lewis v. King, 2 Bro. C. C. 600.

(*g*) Rothwell v. Rothwell, 2 S. & S. 218. (*h*) Ibid.

(*i*) Mortlock v. Leathes, 2 Mer. 491.

what ought to have been done has been done, and orders the payment, not as a debt by a debtor, but as of moneys realized and in the hands of the executor or trustee.

Upon the same principle, money admitted by an executor to be in the hands of his partner, will be considered as in his own hands for the purpose of being called into Court; (*k*) but in *Freeman* v. *Fairlie*, (*l*) it was held that an admission by an executor that the whole amount of the property was invested in India, on public securities, either in his own name or in the name of a house in which he was a partner, but subject to his disposal, unless some part was in the hands of the house at interest, *which he believed might be [*470] the case, was held not to be a sufficient admission of money in his hands to order the payment into Court of any part of it; (*ll*) for although an executor dealing with money in his hands, is bound to ear-mark it, yet if he does not do so, and cannot answer as to the state of it, the Court has no power to act as upon an admission. (*m*)

It is to be observed, that it is only upon the admission of the executor, or other trustee, that the trust money is actually in his hands, that the Court will order it to be paid in; if, therefore, a defendant admits a sum of money to have come to his hands properly belonging to the trust, but adds that he has made payments on account of the estate, he will be allowed to deduct the amount of his actual payments, and to pay in the balance only. (*n*)

This, however, will be the case only where the payments have been properly made; where the payments have been improperly made, *e. g.* where they involve a breach of trust, the trustee will not be permitted to avail himself of such payments for the purpose of resisting the payment into Court; therefore, where executors had by their answer admitted the receipt of the testator's property, but stated that they had lent it on a promissory note, the Vice Chancellor, Sir John Leach, upon an application that they might pay the money thus lent into Court, held that, having admitted the receipt of the money, the executors could not by alleging an improper application of it, protect themselves from payment into Court. (*o*) So also, where moneys directed by a settlement to be laid out in government or real securities were lent by the trustees to the husband on bond, the trustees were ordered, on motion, to pay the money into Court. (*p*)

This principle was likewise acted upon in *Rothwell* v. *Rothwell*, (*q*) before referred to, in which the Court ordered the defendant to pay in a sum of money which he had contracted to pay to the trustees of his marriage settlement, but had omitted to pay.

*And it is not only in cases where trust money has been improperly lent, that it will be ordered into Court, it will be ordered in, [*471] even where the lending may have been warranted, by the trust deed, upon the allegation that the fund is in danger. (*r*)

It is to be observed that, in order to induce the Court to direct the immediate bringing in of a sum of money upon an interlocutory application, the money must be clearly trust money; where it is not impressed with a trust, but is in the nature of a mere debt, the Court will not make an order for the payment of it into Court till the hearing of the cause; thus, in *Peacham* v. *Daw*, (*s*) where a bill was filed against a defendant, insisting that a certain sum of money

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(*k*) Johnson v. Aston, 1 S. & S. 73.
(*l*) 3 Mer. 39.
(*ll*) Freeman v. Fairlie, 3 Mer. 39.
(*m*) Ibid.
(*n*) Anon, 3 Sim. 359.
(*o*) Vigrass v. Binfield, 3 Mad. 62; *vide etiam*, Beaumont Meredith, 3 V. & B. 180.
(*p*) Collis v. Collis, 2 Sim. 365.
(*q*) 2 S. & S. 217.
(*r*) Payne v. Collier, 1 Ves. J. 170.
(*s*) Mad. & Geld. 98.

claimed by her as a gift from the testator, shortly before his death, continued to be part of his assets, and upon the coming in of the answer the plaintiff moved that the defendant might pay the money into Court, on the ground that she had admitted circumstances in her answer which made it clear that it was part of the testator's assets, the Vice Chancellor, Sir J. Leach, refused the application, observing that the proper course was to set the cause down upon bill and answer, and that it was "matter of decree."

In *Rothwell* v. *Rothwell*, (*t*) the Court appears to have gone to a much greater length than in any case which preceded it, as the money ordered to be paid in was in fact a mere debt due from the defendant to the trustees, and had scarcely received the impress of the trust, never having been in the hands of the trustees; the Court, however, appears to have acted in this case upon the rule of equity—to follow trust money wherever it is to be found and to bring it into Court.

This rule has been laid down very broadly, by Lord Abinger, in *Lee* v. *Macaulay*, (*u*) who said "that where a Court of Equity traces out trust money in the hands of a person who has not *primâ facie* a right to hold it, that money must be brought into Court," and it appears to have been the rule acted upon [*472] in *Payne* *v. *Collier*, (*x*) in which a trust fund, which had been lent by the trustees, was ordered into Court at the instance of the same trustees, upon the allegation by them that it was in danger.

It is not necessary, to induce the Court to order trust money to be paid in, that the trust should be one absolutely declared; it will, in many cases, do the same where the trust is only implied; as in the case of vendors and purchasers, in which case, as the Court considers what is agreed to be done as done, it will treat the vendor as a trustee for the purchasers of the estate contracted for, and the purchaser as a trustee, for the vendor, of the purchase money.

Sir Edward Sugden, in his learned treatise upon the Law of Vendors and Purchasers of Estates, (*a*) thus states the rule in practice of calling upon the purchasers of estates to pay their purchase money into Court: "A new practice has sprung up by which certainly some suits have been quickly disposed of, but which has been a great surprise upon many parties. I allude to the practice of ordering a purchaser *in possession of the estate*, upon motion, to pay the purchase money into Court. This, under special circumstances, has even been done before answer, (*b*) but the purchaser has in some cases had the option to pay the money or give up possession; (*c*) in others occupation-rent has been set, deducting interest on the deposit, (*d*) and in others a Receiver has been appointed; (*e*) and payment of the money will be ordered, although by the agreement it is payable by instalments and a portion of it is to remain secured upon the estate." (*f*)

This rule has been adopted where the possession has been given under a mutual apprehension that the title could be immediately made good, (*g*)—where [*473] the purchaser had a sort of *mixed possession with the vendor, and had paid part of the purchase money, was insolvent, and had

(*t*) 2 S. & S. 217.
(*u*) 1 Y. & C. 267.
(*x*) 1 Ves. J. 170.
(*a*) Vol. 1 p. 357.
(*b*) Dixon v. Astley, 1 Mer. 133; see Burroughs v. Oakley, ib. 52, 376, n.; Blackburn v. Stace, Mad. & Geld. 69.
(*c*) Clarke v. Wilson, 15 Ves. 317; Smith v. Lloyd, 1 Mad. 83; Morgan v. Shaw, 2 Mer. 138; Wickham v. Evered, 4 Mad. 53.
(*d*) Smith v. Jackson, 1 Mad. 618; Smith v. Lloyd, *ubi supra*.
(*e*) Hall v. Jenkinson, 2 V. & B. 125; see Clarke v. Elliott, 1 Mad. 606.
(*f*) Younge v. Duncombe, 1 You. 275.
(*g*) Gibson v. Clarke, 1 V. & B. 500; see 1 Mad. 607.

attempted, without effect, to sell the estate, (*h*)—where the purchaser approved of the title and prepared a conveyance, and then raised objections, (*i*)—where the purchaser had been guilty of laches and cut underwood; (*k*) even in a case where it appeared, on the face of the abstract, that the title was bad, but the purchaser had sold and conveyed the estate to another purchaser. (*l*) So where, from circumstances, an acceptance of the title was inferred. (*m*) Again, where a time was fixed for payment of the purchase money by instalments, and the property was a *coal mine.* (*n*) In all these cases the rule has been applied, and if the estate be sold under a *decree*, the purchaser, if he enters into possession, will be compelled to pay his purchase money into Court, unless he entered with the express consent of the *Court.*" (*o*)

"But where the sale is not by the Court, and the seller has thought proper to put the purchaser into possession, with an understanding between them that he shall not pay his money until he has a title, the purchaser cannot be called upon to pay the money into Court in this summary way; (*p*) nor can the payment be compelled where the vendor gives possession without stipulation, (*q*) or the purchaser was in possession under another title before the contract; (*r*) or the possession was given independently of the contract, and the seller has been *guilty of laches; (*s*) although, in such cases, the purchaser [*474] may make himself liable to the demand, by dealing improperly with the estate, *e. g.* cutting trees or selling it to another person. (*t*) But the purchaser, after a long period, will not be permitted to keep possession of the estate and also withhold the purchase money: if a title has not been made, he will be put to his election within a reasonable time, *e. g.* two months to give up the possession or pay the purchase money. (*u*)

If an agreement be by parol, for sale, at so much per acre, and possession be given to the purchaser without any understanding respecting the period when the purchase money should be paid, and the bill alleges a quantity of land to be sold, which is denied by the answer, and the bill only seeks a performance as to the larger quantity, no money will be ordered into Court. (*x*)

The same learned author then proceeds to deduce two simple rules from the cases: "1st. Where the possession is taken under the contract or is consistent with it, and the purchaser has not dealt improperly with the estate, the cause must take its regular course."

"But 2d. If the possession by the purchaser without payment of the money, is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, for example, cutting timber

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(*h*) Hall v. Jenkinson, *ubi supra.*

(*i*) Walters v. Upton, Coop. 92, n., but see Bonner v. Johnston, 1 Mer. 366; and see Crutchley v. Jerningham, 2 Mer. 502; Fournier v. Edwards, T. T. 1819, V. C. The deeds were executed and an application was made for the completion of the purchase, but the purchaser had not the money. The motion was made upon the answer, by which the defendant claimed compensation for some charges.

(*k*) Burroughs v. Oakley, 1 Mer. 52, 376, n.; Dixon v. Astley, ib. 133, 378, n.; Bradshaw v. Bradshaw, 2 Mer. 492.

(*l*) Brown v. Kelty, L. I. Hall, July, 1816, MS.

(*m*) Boothby v. Walker, 1 Mad. 197; and see Smith v. Lloyd, 1 Mad. 83.

(*n*) Buck v. Lodge, 18 Ves. 450. (*o*) Anon. L. I. Hall, 16 July, 1816. MS.

(*p*) Gibson v. Clarke, 1 V. & B. 500. (*q*) Clarke v. Elliott, 1 Mad. 606.

(*r*) Freebody v. Perry, Coop. 91; Bonner v. Johnson, 1 Mer. 366.

(*s*) Fox v. Birch, 1 Mer. 105.

(*t*) Cutler v. Simons, 2 Mer. 103; Bramley v. Teal, 3 Mad. 219; Gell v. Watson, ib. 225.

(*u*) Tindal v. Cobham, 2 M. & K. 385.

(*x*) Benson v. Glastonbury, N. & C. Com. C. Coop. 42, this seems to be the point of the case.

by which the property is lessened in value, or selling the estate by which the first seller's remedy is complicated without his assent; in such cases, the Court will interpose and compel the purchaser to pay the purchase money into Court."

The principle of ordering money into Court upon a trust by implication, was acted upon by Sir Lancelot Shadwell, V. C., in *Parry* v. *Ashley*, (*x*) in which his Honor directed the proceeds of a policy of four lives, upon a freehold house, which had been renewed by an executrix after the death of the testator,

[*475] to be *brought into Court, on the application of the widow in a suit instituted by her for the administration of the testator's estate; not on the ground that the proceeds of the policy formed part of the personal estate, but because they were affected with a trust for the benefit of the persons interested in the real estate under the will.

It was also followed, in *Lee* v. *Macauley*, (*y*) where the Court of Exchequer held, that where goods had been specifically and not generally consigned, by a trader abroad to merchants in this country, was trust money in the hands of the consignees, and upon a bill filed against them by the representative of the trader for an account, ordered the proceeds of the consignment to be brought into Court. (*z*)

The practice of the Court, with regard to compelling the payment into Court of money constituting partnership property, has been stated by Mr. Collyer, in his treatise on the Law of Partnership, (*zz*) in the following manner.

"As the rule is, that he who seeks equity must do equity, it seems clear that where the plaintiff is a private debtor to the partnership, he cannot insist upon an account without paying the amount of his debt into Court. Thus, in an early case, it is laid down that if one partner borrows any money out of the partnership trade, his own share shall be answerable for it, and he shall not be permitted to come into equity and pray an account without making satisfaction for the debt. (*a*) So in a case before Lord Nottingham, one partner having sued the other for money had and received, and the latter having filed his bill for an injunction to stay proceedings at law and for an account, the Court entertained the suit, and decreed an account, the plaintiff having first paid into Court the money in question. (*b*) Upon similar principles it should seem, that if the defendant swears by his answer that a specific sum is due from the plaintiff to

[*476] the partnership as a private debt, that sum *must be paid into Court by the plaintiff before an account will be decreed.

"But one partner, whether plaintiff or defendant, may receive *partnership* money and effects, and insist on not paying in the amount, unless all the other partners will pay in what they have in their hands, (*c*) and, *à fortiori*, if a partner *as partner* receives money belonging to the firm, and admitting that he has received it, insists that there is a balance in his favour, there is no pretence for making him pay it in. (*d*) If, however, a partner has received partnership money, under circumstances from which you can infer that he had agreed not to receive it, and that his receiving it was contrary to good faith, then he may be ordered to bring it into Court. Thus, in *Foster* v. *Donald*, (*e*) where the plaintiff, and the defendant, David Donald, carried on business together in the north of England; it had been proposed to dissolve the partnership, and the

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(*x*) 3 Sim. 97. (*y*) *Ubi supra.*
(*z*) *Vide etiam* Bogle v. Stewart, Dom. Pro. 1801, cited ib.
(*zz*) P. 165.
(*a*) Vin. Abr. Partners, (E), 5; Meliorucchi v. Roy. Exch. Ass. Compy. 1 Eq. Ca. Abr. 8.
(*b*) Gold v. Canham, 2 Swanst. 325; 1 Ch. C. 311, S. C.
(*c*) Foster v. Donald, 1 Jac. & W. 253. (*d*) Ibid. 252.
(*e*) *Ubi supra.*

terms of the dissolution had nearly been arranged, when the defendant said that before finally acceding to them it would be proper for him to go to London, for the purpose of consulting a friend residing there. In the course of his journey he went round to several customers of the firm in different parts of the country, and collected of them debts due to the partnership, to the amount of about £2318. In one instance, a debt due by himself had been set off against a debt due to the firm, and he received the difference; upon a bill filed for an account of the partnership transactions, the defendant, though by his answer stating his belief that the balance of the account would be in his favour, was ordered to pay the £2318 into Court."

It is to be observed, in that case the judgment was founded upon the conduct of the defendant, which amounted in fact to a fraudulent abstraction; but where there are no circumstances of that description to support the application the rule will be adhered to, that "if a partner, as partner, receives money belonging to the firm, and admitting that he has received it *insists that there is a balance in his favour, there is no pretence for making him pay it in. (*f*) [*477]

The subject has since been very fully discussed by Lord Cottenham in his judgment in *Richardson* v. *the Bank of England*, (*g*) in which his Lordship has, with great clearness, pointed out the principles of the Court with regard to ordering the payment into Court of money by one partner at the instance of another partner, and the result is strongly confirmatory of the principles above laid down.

It is to be remarked, that although the Court will order trust money, admitted to be in the hands of a party, to be paid into the name of the Accountant General, on interlocutory application, it will not order interest upon such money to be so paid. (*h*) The only case in which the Court appears to have acted in opposition to this rule is that of *Freeman* v. *Fairlie*, (*i*) but that was under peculiar circumstances, the defendant having, by his answer, admitted that he had made interest to a larger amount than the sum he was ordered to pay in, and Lord Eldon said, he was very unwilling to carry the practice further than it had been carried.

The same principles which apply to trust moneys, and will induce the Court to order them to be paid in to the name of the Accountant General, will be acted upon in the case of trust stock, or trust money invested in exchequer bills, which the Court will order the party holding it to transfer into the name of the Accountant General of the Court. The Court will also, wherever it may be necessary for their protection, order specific chattels to be deposited with the Accountant General.

A payment of money into Court upon an interlocutory application does not alter the rights of the parties interested in the fund;—therefore, if an executor or administrator pays into Court, money which he has received from the estate of the deceased, his right to retain a debt due *to him from the deceased is not prejudiced, (*k*) and where the fund in Court is [*478]

(*f*) *Per* Lord Eldon, in Foster v. Donald, *ubi supra*.
(*g*) 4 M. & C. 165. (*h*) Wood v. Downes, 1 V. & B. 50.
(*i*) Cited ibid. 3 Mer. 29.
(*k*) Langton v. Higgs, 5 Sim. 229;—The only instance in which the payment into Court will effect the right of the parties, is where money due to a wife is paid into Court in a suit to which the husband and wife are parties, which will have the effect of depriving the wife of her right by survivorship, unless the payments be into the joint names of the husband and wife. *Ante*, Vol. 1, p. 155.

insufficient to discharge the administrator's debt, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied. (*l*)

It is said, in *Bencraft* v. *Rich*, (*m*) that funds belonging to wards of the Court cannot be transferred into the name of the Accountant General to the credit of the cause, until the account has been taken by the Master, and his report made;—this, however, must be understood as meaning merely, not that such a transfer cannot be made, but that it will not operate as a discharge to the trustees until they have passed their accounts. (*n*)

SECTION II.

Application for.

When it is said, that where a Court of Equity traces out trust money in the hands of a person who has not *prima facie* a right to hold it, that money must be brought into Court, (*o*) the *dictum* must be understood as implying that the person applying to have it brought in must have an interest in its protection.

The general rule may be stated thus, that the plaintiffs must be solely entitled to the fund, or have acquired in the whole fund such an interest, together with others, as entitles them on their own behalf and the behalf of those others to have the funds secured in Court. (*p*)

[*479] *It seems, however, that where the plaintiff is merely entitled to a portion of a fund which portion is clear, he will only be permitted to have the portion, to which he is entitled, secured; therefore, where a widow, as administratrix of her husband, was called upon to transfer into Court a sum of bank stock which formed part of the personal estate of her husband, whose debts had all been paid, the Court of Exchequer thought that, as she was clearly entitled to a third of the personalty, they could not keep her out of the possession of that part, and accordingly granted the rule only as to two-thirds of the bank annuities. (*q*)

It is to be noticed, that the party applying must show an actual title to the property intended to be secured, or some part of it, either in possession or reversion, and that a probability of title will not be sufficient; therefore, although the Court will appoint a Receiver of personal estate, on account of the pendency of a suit in the Ecclesiastical Court to recall the probate of a will, it will not, on that account alone, order the executor named in such will to pay into Court, money in his hands belonging to the deceased's estate. (*r*)

Applications for payment of money, &c. into Court, should be made by special motion, of which notice must be given, and they are most commonly

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(*l*) Chissum v. Dewes, 5 Russ. 29, *ante*, p. 63.
(*m*) 1 Bro. C. C. 56.
(*n*) *Vide* ibid. Belt's Edition, note (1.)
(*o*) *Ante*, p. 471.
(*p*) Freeman v. Fairlie, 3 Mer. 29.
(*q*) Rogers v. Rogers, 1 Anst. 175.
(*r*) Reed v. Harris, 7 Sim. 639. This, however, appears to be somewhat at variance with the order of Lord Hardwicke, in Montgomery v. Clarke, 2 Atk. 379, in which his Lordship, under circumstances in some respect similar, made an order upon one of the executors to pay in the balance in his hands. It is however to be observed, that, in that case, there had been an actual decision of the Court setting aside the will as to the real estate, on the ground of the insanity of the testator.

made after the answer has come in; but they are not unfrequently made after decree upon admissions in proceedings under or before a Master, and may in some cases be made before answer.

To support an application for the payment of money into Court upon the answer, there must be a clear admission, by the answer, of the plaintiff's title; therefore, where the defendant by his answer merely says he does not know and cannot set forth as to his belief otherwise, whether the plaintiff *sustains the character he assumes, an order will not be made. (s) [*480]

Nor will the plaintiff be allowed, in such a case, to make use of affidavits to supply the defect in the answer, the rule of the Court being, that the order shall be made upon the defendant's admissions alone. (t) This rule, however, must be understood as applying to proof of the plaintiff's title; for it has frequently been decided that though the Court will not, upon application of this sort, allow affidavits to be read in support of the plaintiff's title, it will receive affidavits to verify collateral facts; thus, upon a motion that a purchaser may pay his purchase money into Court, it will allow affidavits to be read to prove that he has exercised acts of ownership. (u)

As the Court will not order money into Court where there is no admission of the plaintiff's right, still less will it do so where it is denied by the answer; therefore, if a bill be filed stating a settled account, and by the answer it is denied that the account is just, the plaintiff cannot move that the defendant may pay into Court the money on the account so admitted, as he might if the account were admitted to be correct. (x)

It must also appear to be admitted, either in the answer or in the schedules annexed to it, that there is a balance actually in the hands of the defendant. (y) It is not, however, necessary, that the actual amount of the balance should be stated either in the answer or in the schedules; if the answer contains a schedule not cast up, the sums may be cast up, and, on affidavit of the amount of what appears to be due, the order will be made. (z)

It is to be observed, however, that in such cases it is the answer only that is to be relied upon, and thus no affidavit can be *used in support of the application, except that of a calculator or accountant who examines the schedule annexed to the answer, and swears to the amount in the hands of the executor appearing therefrom. (a) [*481]

It is true, that if a defendant brings a book into the Master's Office, and states that it contains an account of receipts and payments, and affidavit is made giving the defendant the credit he craves, charging him with what he admits, and simply casting it up, the balance may be ordered in upon motion; (b) but if the case is more complicated than that, and the question is what is the result of that more complicated account? that cannot be the foundation of a motion for paying in the money. (c)

(s) Dubless v. Flint, 4 M. & C. 502; *sed vide* and *quere* Farrer v. Hutchinson, 3 Y. & C. 706, *contra*.

(t) Black v. Creighton, 2 Moll. 554.

(u) Bradshaw v. Bradshaw, 2 Mer. 492; Crutchley v. Jerningham, ib. 502; *ante*, p. 473.

(x) —— v. Bailey, 30, July, 1805; 2 Mad. C. P. ed. 1837, 523; *vide etiam*, Richardson v. the Bank of England, 4 M. & C. 177.

(y) With respect to what will be considered as money in the hands of a defendant, *vide ante*, p. 470.

(z) Mills v. Hanson, 8 Ves. 68; Quarrell v. Beckford. 14 Ves. 178.

(a) Black v. Creighton, *ubi supra; vide etiam* Richardson v. the Bank of England, 4 M. & C. 165, 177, in which the principles upon which money is ordered into Court upon a defendant's admission is very fully reviewed.

(b) Mills v. Hanson, *ubi supra*. (c) Ibid.

And it is to be observed, that as the motion must be founded on an admission in the answer, it is necessary, where the application is made to order payment upon an account appearing in a book, the book must be referred to in such a way as to make it part of the answer or schedule, (*d*) and where the defendant has referred to several books, it will not be sufficient to make the application upon the casting up of some of the books, it must be the result of *all the books*. (*e*)

The same indulgence which is allowed to a plaintiff of verifying the amount of the balance admitted by the answer, will, in certain cases, be extended to the defendant; and where an executor admits, in his answer, that he has received a specific sum belonging to the testator's estate, but adds that he has made payments on account of the estate, the amount of which he does not specify, the Court will allow him to verify the amount of his payments by affidavit, and then will order him to pay the balance into Court. (*f*)

It may be noticed, in this place, that where an application was made to Sir
[*482] A. Hart, L. C., in Ireland, to discharge an *attachment issued for disobedience of an order, made by the Master of the Rolls there, for the payment into Court of a balance admitted to be in his hands, the question arose whether the executor was entitled to retain enough to answer the probable accruing expenses of suits; and that his Lordship upon that occasion, observed that Sir J. Leach had always held the opinion that the executor should bring in all; but that when he (Sir A. Hart,) was Vice Chancellor, he had acted on a different principle; and that he thought the Court had no right to cramp any executor who was engaged in suits, by leaving him to carry on those suits on his own funds, and that Lord Eldon had sustained his views in that respect,—"I do not mean," his Lordship continues, "merely costs already incurred; there never could be any doubt about them, but probable growing costs. I know it is said the executor can come to the Court for money to be advanced to him as he wants it, but I do not think he is to be compelled to do that." (*g*) It is right, however, to state that the opinion of Sir Anthony Hart, in the case referred to, appears to be at variance with that of Lord Thurlow in *Yare* v. *Harrison*. (*h*)

Money may be ordered to be transferred into Court after decree, either upon admissions in the examination of an accounting party or upon the Master's report.

It is stated by Lord Eldon, in *Hutch* v. ——, (*i*) that according to the old practice, you could not, between the original decree and the hearing upon further directions, move to have money into Court; but that applications upon examinations admitting money to be due have been long the settled practice. The rules which govern applications of this nature, at this stage of the cause, are precisely the same as those which govern applications upon admissions in the answer, with the exception, however, that the party applying need not be the plaintiff in the cause; indeed if the plaintiff be the accounting party, the application may be made against him. It also will be unnecessary to show the
[*483] title of the party to make the application *by admission, in the examination, but such title must appear from the decree or other proceedings in the cause.

It appears to have been formerly the practice, not to order money into Court upon the Master's report before the hearing upon further directions; but, in

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(*d*) Ibid. Roe v. Gudgeon, Coop. 304.
(*e*) Mills v. Hanson, *ubi supra*.
(*f*) Anon. 4 Sim. 359.
(*g*) Betagh v. Concannon, 2 Moll. 59.
(*h*) 2 Cox. 377; *ante*, p. 468.
(*i*) 19 Ves. 116; *et vide* Wood v. Downes, 1 V. & B. 49; Fox v. Mackreth, 1 Ves. J. 69.

Gordon v. *Rothley*, (*k*) this practice appears to have been first broken through, and that decision has since been recognized by Sir John Leach, V. C., in *Creak* v. *Capell*. (*l*) It seems, however, that, to entitle a party to obtain such an order, the report must have been confirmed, and that, pending exceptions to the report, the balance will not be considered to be ascertained. (*m*)

Where, however, it is evident, that an exception is taken merely for delay, the Court will advance the exception for immediate hearing. (*n*)

It is to be observed that, upon hearing exceptions to the Master's report, it is competent for the Court, although it allows them and directs the Master to review his report, to order the accounting party to pay a sum of money into Court, without a special application by motion. The Court, however, will not do so unless it is satisfied that the probable result of the reference back to the Master will be the finding such a sum due from the party. (*o*)

The cases in which the Court have ordered money into Court before answer, are very rare. In *Jervis* v. *White*, (*p*) Lord Eldon made such an order upon the ground of fraud, and in doing so stated, that he fastened upon the affidavit of the defendant in answer to that filed by the plaintiff, as Lord Kenyon had done in *Vann* v. *Barnett*, (*q*) where though it was held that in general in such cases the Court will not act effectively between the parties till the answer comes in, yet if the defendant answers the affidavit, the Court will look at the affidavit as if it were the answer.

The Court has also, as has been already stated, ordered the *purchaser of an estate to pay his purchase money into Court [*484] before the answer has been put in. (*s*)

It is to be recollected, that, in *Higgins* v. ———, (*t*) Lord Eldon directed, as a general rule, that in future, upon motions for the payment of money or transfer of stock into Court, a day should be named, and said that where an order is obtained to pay money into Court, at a given time, the Court will inquire whether there has been any former order, and, if there has, will make the party shew cause why he shall not pay interest.

(*k*) 3 Ves. 572.
(*l*) Mad. & Geld. 114.
(*m*) Ibid.
(*n*) Ibid.
(*o*) Brown v. De Tastet, 4 Russ. 126.
(*p*) 6 Ves. 738.
(*q*) 2 Bro. C. C. 158.
(*s*) *Vide ante*, p. 472.
(*t*) 8 Ves. 381; *ante*, vol. 2, p. 705.

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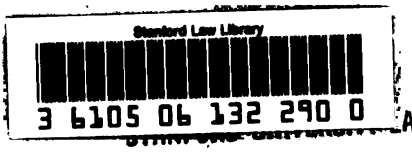

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